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SPECIAL NOTICE

Your attention is called to the article, "Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience," which reflects an area of great interest. (It appeared in the American Bar Association's 31 *Administrative Law Review* 247 (1979).

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READEX FICHE

Report 328-3
March 1980

ATTITUDES TOWARD THE USE OF THE TELEPHONE IN ADMINISTRATIVE FAIR HEARINGS: THE CALIFORNIA EXPERIENCE

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I. *Introduction*

In 1970, the California Unemployment Insurance Appeals Board (CUIAB) began experimenting with the use of telephone conferences to conduct unemployment insurance appeals hearings. In the years since 1970, this telephone hearing innovation has received favorable comment from the courts[1] and has been expanded by the CUIAB as the normal procedure for conducting interstate[2] and simultaneous divided hearings.[3] Additionally, the telephone hearing is utilized by the CUIAB where travel difficulties place a hardship on one or more of the parties who would attend a normal in-person intrastate appeal hearing.

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[1] *Slattery* v. *California Unemployment Insurance Appeals Board*, 60 Cal App. 3d 245, 131 Cal. Rptr. 422 (1976). This case is discussed in Section II.

[2] Interstate appeals generally involve a claimant-employee who has left California, moved to another state and received an adverse action filed on an unemployment insurance claim for which California is liable. In-person procedures for handling interstate claims of this nature involve two separate hearings, one held by a California administrative law judge with the employer, and the other held by an appeals referee in the distant state with the employee. A detailed discussion of California Unemployment Insurance Appeals Board (CUIAB) in-person procedures for handling interstate appeals is presented in Section II.

[3] Simultaneous divided hearings generally involve intrastate claims where a claimant-employee has separated from a job in California, moved to another location in California and received an adverse action on an unemployment insurance claim for which California is liable. Simultaneous divided hearings generally involve two separate in-person hearings, one with the former employee and the other with the interested employer, held by two different California administrative law judges who attempt to schedule the hearings to occur at approximately the same time. CUIAB in-person procedures for conducting simultaneous divided hearings are described in Section II.

READEX FICHE

Prepared by Employment and Training Administration

Beginning in October 1977, the Fair Hearing Project (FHP)[4] began a study of the CUIAB use of telephone hearings. In April 1978, the FHP conducted a survey of CUIAB Administrative Law Judges (ALJs) to investigate their experience with and reactions to telephone hearings. The purposes of this article are (1) to describe in detail the background of this innovation in California, (2) to report on the nature of the telephone hearing procedure as currently implemented by the CUIAB, and (3) to present the findings of the California Administrative Law Judge Survey.

II. *The Development of the Telephone Hearing Innovation in California*

California is a large State with a very mobile population.[5] Frequently, employees terminate jobs in one part of the State and move either to another distant location in California or to another state. Thus, many unemployment insurance appeals in California involve an interested California employer and a claimant whose location is at a considerable distance from the original place of employment. Such "split hearing" situations have presented the CUIAB and other state employment security agencies with a difficult situation in that a single in-person administrative appeal hearing involving all parties is not feasible. Prior to the telephone hearing innovation, the CUIAB had implemented several different types of procedures for handling appeals where the interested California employer and the former employee were geographically distant.[6] Before 1970, the normal procedure for handling interstate appeals involved two separate in-person hearings: one in the state where the claimant was residing, the other in California. The employment security agency in the state where the former employee resided at the time of the appeal acted as an "agent state" and conducted an in-person hearing with the claimant-employee; a separate in-person hearing was conducted by a California ALJ who heard the testimony of the interested employer. Each party was furnished with a record of the testimony given by the other party and a reasonable amount of time was left open for written rebuttal to the evidence contained in the record of the opposing party.

In-person intrastate split hearings have been conducted by the CUIAB in two ways. Initially, the procedure required one ALJ to hear the appellant to determine whether or not the appellant had a prima facie case.[7] If the determination was negative, the appeal was denied at this point. If the ALJ determined that the appellant had made a prima facie case, a transcript of the record was prepared and the appeal was sent to the appeals office nearest the respondent's residence or place of business. A second ALJ would then conduct a separate in-person hearing with the respondent. The ALJ who had heard the respondent would subsequently prepare a decision based on the record of both hearings. The problems which led to the abandonment of this system were noted by the CUIAB Chief Administrative Law Judge:

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[4] The Fair Hearing Project (FHP) is a research project which has been based at the University of New Mexico. The primary effort of the FHP has been to investigate the use of telephone conferencing in unemployment insurance and welfare administrative fair hearings as conducted by the New Mexico Department of Human Services. Given that the CUIAB has conducted telephone hearings since 1970, the FHP has devoted a portion of its efforts to studying the California experience. In October 1977, several faculty research associates of the FHP travelled to California and observed telephone hearings at CUIAB offices in San Francisco, Oakland, and Los Angeles.

[5] According to the 1970 U.S. Census of Population, California, the third largest state geographically, had the largest state population (18,318,000). In the period between 1965 and 1970, 50.9 percent of the state's population moved to another residence which places California in the fourth highest national ranking for population mobility. U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PC(2)-2B.

[6] CAL. UNEMPLOYMENT INSURANCE CODE DIV. 1, pt. 1, ch. 8, §1951 specifies that the manner in which appeals are to be conducted is to be in accordance with rules prescribed by the California Unemployment Insurance Appeals Board.

> There were numerous drawbacks to this procedure. The appellant, generally the claimant, did not have the benefit of "hearing" or reading the evidence offered by the respondent, while the respondent had advance knowledge of the appellant's case. What was a prima facie case was a matter of conjecture. Often the appellant would have evidence that would be in the possession of the respondent. Occasionally, an employer-respondent, through a representative, would appear at the appellant's hearing, and for claimants this worked a disadvantage. There was no opportunity to either party for cross-examination or rebuttal. There were time lapse delays, because of the necessity of preparing a transcript of respondent's hearing.[8]

This procedure was replaced by a procedure calling for divided intrastate hearings. Under the revised procedure, one hearing before an ALJ for the appellant and a second separate hearing before a different ALJ for the respondent were scheduled as nearly simultaneously as possible. Prior to the hearings, each party was sent a copy of departmental case records and asked to submit the interrogatories and documents they wished considered. If the ALJ found the questions submitted by the parties material to the issues, the ALJ would ask the appropriate questions of the opposing party, the party's witnesses or the departmental claims representatives. At the conclusion of the hearings, each party was furnished with a record of the hearing of the opposing party and an opportunity to offer, within a reasonable period of time, written rebuttal to the evidence contained in the record of the opposing party. After the specified time for the submission of rebuttals, the ALJ who had initially heard the appellant prepared the decision. Once again, the CUIAB Chief Administrative Law Judge noted problems particular to the simultaneous divided hearing:

> The simultaneous hearing procedure had several drawbacks. One of the parties may have been granted for good cause a continuance. The appellant might not appear, and then the respondent was put to an unnecessary expense; if dismissed, the matter would be reopened if good cause were shown. While each party had the right to submit interrogatories for the other party, this was infrequently used nor would it be as effective as questioning at the hearing because of the inability to anticipate in advance the other's evidence.[9]

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[7] The appellant could be either the employee or the employer. For instance, following an agency determination not to award unemployment insurance benefits either because the employee is initially held to be disqualified from benefits or because the employee is determined to be ineligible after benefits have been received for some time, the employee may appeal the determination which constitutes an adverse action to the claim. Former employers may appeal an agency determination to award benefits to a former employee whom the employer believes should be denied benefits. Employers may take such actions to prevent certain claims from being charged to their account which in turn affects their tax rate in the future. *See* CAL. UNEMPLOYMENT INSURANCE CODE §901 *et seq.* for provisions regarding employer contribution rates. Sections 976.5(a), 977, and 978 of this Code specify the manner in which the amount of an employer's contribution to the Unemployment Fund is contingent upon the charges to and balance remaining in an employer's account.

[8] Letter from Jack D. Clevenger, CUIAB Chief Administrative Law Judge, prepared for distribution to the chief appeals referees in the employment security agency of each state (November 25, 1977).

[9] *Id.*

Still, the simultaneous divided procedure was preferable to the previous procedure for holding intrastate split hearings in that neither side had the advantage of knowing the testimony of the other side prior to giving testimony.

The obvious difficulty with each of these in-person procedures for conducting split hearings was that the parties to the hearing only confronted each other indirectly.[10] No single ALJ heard the testimony of both sides or had the opportunity to question both sides. Appellants and respondents could only question one another via interrogatories. This procedure would seem to favor the more sophisticated or those with resources sufficient to retain professional assistance, an advantage which could be expected to accrue most often to employers. The parties in these split hearing situations were unable to listen to one another give testimony or to question, object, or give counter testimony in the real time of the hearing itself. In the interstate hearing, the problems were compounded by the fact that the agent state hearing officer was generally less familiar with the eligibility laws of the liable state. Furthermore, agent state hearing officers might be unfamiliar with the particular regulations and precedents controlling in the California appeal. Thus, much of the record generated by the agent state hearing officer might be irrelevant to the ALJ in California who would have to decide the case. Finally, while all California ALJs are bound by rules of impartiality, interstate and simultaneous divided appeals were generally decided by an ALJ who had heard only one of the parties and who had merely a tape recording and/or a written record regarding the other party, a circumstance which some participants might be inclined to view as an advantage to the party testifying before the ALJ who would render the decision.

After reviewing the difficulties involved in attempting to provide in-person hearings when appellants and respondents were geographically separated from one another, the CUIAB decided in 1970 to experiment with telephone hearings. The CUIAB was concerned that both the in-person interstate hearings procedures involving agent state hearing officers and the intrastate simultaneous divided hearing were deficient in providing participants with genuine due process confrontation rights. Additionally, the CUIAB was concerned that the record produced by such split in-person hearing modes included many gaps, irrelevancies, and missed communications resulting from the fact that the record was generated by more than one hearing officer with the parties to the appeal never being in direct contact with one another. The telephone hearing enabled the California ALJ who would ultimately prepare the decision to conduct the hearing; all parties could give testimony, listen to opposing testimony, and question one another in a real time of the hearing situation.

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[10] The opportunity to confront adverse witnesses and evidence frequently has been mentioned in court decisions as an important due process element in administrative fair hearings. Although the specific constitutional issue before the U.S. Supreme Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), concerned the due process necessity of a pretermination evidentiary hearing hearing in an Aid to Families with Dependent Children (AFDC) welfare case, the majority opinion written by Justice Brennan stressed *in dictum* the importance of confrontation in administrative appeals. Justice Brennan noted: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269. *See also, Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959); *Sims* v. *Juras*, 313 F. Supp. 1212, 1215 (1969); *Chung* v. *Park*, 514 F.2d 382, 386 (1975); *Mattern* v. *Weinberger*, 519 F.2d 150, 165-66 (1975).

Major judicial support for California's teleconferencing innovation came with the 1976 California case *Slattery* v. *California Unemployment Insurance Appeals Baord.*[11] The case involved the following facts. Donna Slattery had been employed in Los Angeles as a switchboard operator. Her employer fired her after she allegedly exceeded her 30-minute lunch period. Slattery applied for and was awarded unemployment insurance benefits; the employer appealed the agency's determination that the claimant was eligible for benefits.

At the time of the hearing, the claimant was residing in Eureka, California. The CUIAB followed the simultaneous divided hearing procedure and two hearings were scheduled on December 3, one for the claimant in Eureka and the other for the employer in Los Angeles. Subsequently, the employer's hearing was rescheduled to December 4. Different referees presided at the two hearings; the claimant did not appear at the Los Angeles hearing (the hearing for the employer). Following CUIAB procedure, the ALJ who heard the appellant (the employer) rendered the decision. The ALJ found that the employer had discharged the employee for exceeding the lunch break time and that such action constituted midconduct. Thus, the claimant was disqualified from benefits. The claimant appealed the ALJ's decision to the Appeals Board which affirmed the ALJ's decision.[12] Throughout all of these proceedings the claimant represented herself without the assistance of legal counsel.

The claimant was unsuccessful in her attempts to have the administrative appeals decision reversed at the trial court level. However, after her petition was denied by the Los Angeles County Superior Court, the claimant appealed to the California Court of Appeal for the Second District. In a decision rendered by Presiding Judge Kaus, the Court of Appeal ordered set aside the decision of the Appeals Board. The Court held that the statement on the reverse side of the notice of hearing which informed the claimant of the opportunity each party would be given to offer testimony, present written evidence, question witnesses, and give evidence in explanation or rebuttal was insufficient. As Judge Kaus observed:

> Recognizing its obligations to the generally unskilled and unrepresented litigants that appear before it (*Gibson* v. *Unemployment Ins. Appeals Bd., supra,* 9 Cal.3d 494, 498-499, 108 Cal Rptr. 1, 509 P.2d 945 [PR-430.2-125, BSSUI]), the reverse side of the Board's notice of hearing form contains much information, presumably useful to the average claimant. Unfortunately,

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[11] *Supra* note 1.

[12] 22 CAL. ADMIN. CODE §§5101–5121. CUIAB rules specify procedures for appealing the decision of an ALJ at an administrative fair hearing to the Appeals Board. According to Section 5101 the appeal from a decision of an ALJ must be filed within twenty days after the date of mailing or personal service of a copy of the ALJ's decision. The appeal must be in writing (§5102); and while the appeal need not be formal, it must state the grounds for appeal (§5103). The Appeals Board may remove the case to itself (§5105), or the Board may remand the case for hearing by an ALJ on behalf of the Board (§5106). If the Board does remove the case to itself, only those issues raised by the initial adverse action by the Department of Employment Development or related issues considered by the ALJ at the hearing and in the decision may be covered; the Board may remand to an ALJ for an additional hearing concerning any related issues on which the parties were not afforded a fair opportunity to be heard (§5108). Additionally, the Appeals Board may remand to the Department of Employment Development or to an ALJ for appropriate action on any issue raised for the first time in the appeal to the Board. However, the Board will not consider any substantive issues which were not appealed (§5108). For a Board appeal, the parties may apply to the Board either to present new or additional evidence (§5109) or to present oral arguments and briefs (§5114). Decisions of the Appeals Board are made at regular meetings of the Board and are passed by majority vote with the option for Board members to dissent and prepare a dissenting opinion (§5117).

> the document not only ignores the simultaneous hearing procedure and the Board's practices — written questions to be asked by the referee and the telephone hearing — designed to interrelate the two hearings, but positively implies that no such practices exist.[13]

In scrutinizing the language of the notice, Judge Kaus raised questions which go to the heart of the procedural difficulties intrinsic to the simultaneous divided hearing:

> This information (contained on the notice) would be, at best, puzzling to a person such as claimant who, as far as she knows, is to be the only witness at the hearing she will attend. Whom is she to question? How is she to "give evidence in explanation or rebuttal" if she does not know what evidence has been offered by the other side, or — as in this case — what evidence will be offered by the other side the next day?[14]

Given these procedural difficulties, the Court of Appeal did not reach the issue of the sufficienty of the evidence to justify denial of benefits; rather, in setting aside the Appeal Board decision, the court ordered that the sufficiency of evidence question should be redecided by the Board, "after granting claimant the adversary hearing which its own rules and practices authorize and which claimant did not receive."[15]

That the underlying criticism of the Court of Appeal was directed at the simultaneous divided hearing itself becomes clearer when we consider Judge Kaus's discussion of the telephone hearing option. *In dictum,* Judge Kaus made clear that this innovation offered a creative alternative to the procedural problems evidenced in this case. In his discussion of the case, Judge Kaus first mentions the telephone hearing as follows:

> More importantly, though not mentioned in the formally promulgated rules, Board procedure provides for a conference telephone hearing — an imaginative attempt to solve the due process problems which inhere in the simultaneous hearing concept.[16]

Judge Kaus observed that the telephone hearing innovation was consistent with previous case law specifying the obligations of the CUIAB to provide reasonable fair hearing procedures:

> "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 268-269, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287.) We do not doubt that the regulation providing for simultaneous hearings coupled with the policy that permits conference telephone hearings was designed to do just that, consistent with the rule that the Unemployment Insurance Code is to be "administered informally without resort to technicalities that might deprive the unsophisticated applicant of his right to benefits." (*Gibson* v. *Unemployment Ins. Appeals Bd., supra,* 9 Cal.3d 494, 500-501, 108 Cal. Rptr. 1, 5, 509 P.2d 945, 949 [PR-430.2-125, BSSUI].)[17]

The Court of Appeal clearly indicated its concern that the simultaneous divided procedure contained elements of unfairness:

> Thus, the problem in this case is not that the Board lacked a meaningful procedure which would have permitted claimant to participate — albeit long distance — in the employer's side of the hearing process. Rather, it was the Board's failure to advise this unrepresented lay claimant that such a procedure existed. The result was predictable: in the language of the courtroom, the matter was decided by the Los Angeles referee on the basis of a pretrial deposition given by claimant, and a "live" evidentiary hearing at which only the employer's unimpeached and uncontradicted witnesses testified.[18]

In his concluding paragraph, Judge Kaus emphasized the Court's positive evaluation of the telephone hearing:

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[13] *Supra* note 1, at 424.

[14] *Id.* at 424-25 (parenthetical phrase not in original).

[15] *Id.* at 423-24.

[16] *Id.* at 424.

[17] *Id.* at 425.

[18] *Id.* at 425.

> The Board has devised a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing: the opportunity to cross-examine adverse witnesses and to rebut or explain unfavorable evidence. It does not comport with the spirit of the law with which we deal — as explained in *Gibson* — to permit an unrepresented lay litigant to proceed as if those basic rights did not exist.[19]

The CUIAB received this decision as judicial endorsement of the concept that telephone hearings provided a more adequate method of delivering due process guarantees than was provided in these previous procedures designed to hold in-person split hearings.[20]

III. *Curent CUIAB Procedures for Conducting Telephone Hearings*

Current CUIAB procedures[21] specify that first preference will be given to scheduling a single in-person hearing whenever possible. The CUIAB maintains eleven appeals offices which are distributed throughout California. A single in-person hearing is scheduled whenever a hearing location can be established within one hour commuting time from the claimant's residence and one hour commuting time from the employer's place of business. Also, a single in-person hearing is scheduled if one party advises the appeals office of his desire merely to submit evidence by affidavit or that he does not wish to participate in the hearing. The single in-person hearing at which all interested parties are offered the opportunity to participate is thus the normal method for conducting intrastate unemployment insurance appeals.

For intrastate appeals where one or both of the interested parties have a commuting problem (i.e., the commuting time for the party exceeds the time specifications in the above paragraph), a telephone hearing is the second preference. Even with a telephone hearing, an attempt is made to have the hearing conducted by an ALJ at an appeals office sufficiently convenient for one of the parties so that party can attend the hearing in the presence of the ALJ conducting the hearing. If neither party is within a reasonable commuting distance, a conference telephone hearing is scheduled, and an ALJ at an appeals office conducts the telephone hearings with the parties participating from distant locations. Thus, generally the ALJ and one of the parties (usually the appellant if equipment is available) will appear at a conference phone location and the other party will use a private phone — if the claimant, a residence phone, or if the employer, a business phone.

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[19] *Id* at 425-426.

[20] A complete review of due process and administrative fair hearings is beyond the scope of this article. However, several observations will be noted. While there are no cases, statutes or regulations that specifically address the narrow issue, the clear and consistent attitudes of the courts toward administrative hearings and due process strongly indicate that teleconference hearings would be consistent with due process. There is nothing in the federal or state statutes or regulations that would prohibit teleconference hearings. The federal regulation (*see*, *e.g.*, 45 C.F.R. §205.10) while specifically addressing the application of the hearing requirement, notice requirements, etc., leaves the format of the hearing open to the state agencies. The requirement in 45 C.F.R. §205.10(a)(13)(vi), that the claimant have the opportunity to confront and cross-examine adverse witnesses, does not address the "face-to-face" or teleconference issue, whereby the claimant is allowed to confront and cross-examine witnesses, although this is accomplished via telephone. While the courts have maintained that the opportunity to be heard must be "meaningful" (*see* Armstrong *v.* Manzo, 380 U.S. 545, 552 (1965)), the courts have also maintained that due process requirements regarding administrative fair hearings must "vary according to the circumstances and must be adapted to particular situations" (*see* Citta *v.* Delaware Valley Hospital, 313 F. Supp. 301, 310 (1970)). In *Chung* v. *Park*, 514 F.2d 382, 386 (1975), a case involving a tenured faculty member denied extension of his contract, the ruling stated that due process requirements are "protean in nature" and dependent on the appropriate accommodation of the competing interests involved. For additional judicial comment on this issue, *see*: Cafeteria *v.* McElroy, 367 U.S. 886, 895 (1961); Boddie *v.* Connecticut, 401 U.S. 371, 378 (1971); Caldwell *v.* Laupheimer, 311 F. Supp. 853, 855-56 (1969); O'Donnell *v.* Shaffer, 491 F.2d 59 (1974). Within the context of these decisions, the dictum in *Slattery* supporting telephone hearings as a more sufficient due process proceeding than the in-person split hearing alternative is not surprising.

[21] CUIAB procedures for conducting appeals are reported here from the CUIAB APPEALS PROCEDURES MANUAL.

For interstate hearings, when there is an interested California employer and California is liable for benefits, the telephone hearing is the normal method for conducting the appeal. Should the interested California employer wish to attend the hearing, an attempt is made to schedule the hearing at a convenient appeals office so the employer can be present in person with the ALJ conducting the hearing. The claimant phones the appeals office from the phone location he has available. In both interstate and intrastate hearings, where the party who is not attending the conference phone location has witnesses, the hearing will be held at an appeals office or other location which has conference phone equipment.

Special procedures have been designed by the CUIAB to implement telephone hearings. Case files for telephone hearings are first reviewed to determine which of the claims records are pertinent to the appeal. Relevant records are marked as exhibits and copied. Copies of the records are then mailed to the hearing participants along with the "Notice of Hearing" form. Participants are instructed to have these documents before them at the time of the hearing. Also, participants are told that the documents they wish to introduce during the hearing should be mailed immediately to the appeals office listed on the "Notice of Hearing" form. When documents are received from the hearing participants, the appeals office staff copies them and attempts to get the copies to the other hearing participants prior to scheduled hearing date.

In certain instances, all mailed documents may not have been received. Also, despite the special instructions which participants receive along with the "Notice of Hearing" form, participants may bring to the hearing documents which have not been mailed to the appeals office. In such instances, ALJs attempt to proceed with the hearing in a normal fashion, asking the parties who have documents not available to everyone to testify concerning what they consider the significance of the document. If the document is short enough, it can be read into the record. The ALJ and other parties then question the party concerning the document. When the testimony concerning the document is completed, the ALJ instructs the party to mail the relevant document to the appeals office within a specified period of time. When the document is received, the ALJ can then examine it to determine if the testimony accurately represented the document. Also, the document can be mailed to the other participants and the record kept open for a written response. In extreme cases, when the document is too long or detailed to be handled in this fashion and when the ALJ determines the document to be of sufficient weight and controversy, the hearing can be postponed and rescheduled, with instructions given that the document is to be mailed to the appeals office within a specified period of time. The hearing then can be rescheduled, alloting time for the document to be received, copied, and mailed to the other parties.

When hearing participants are instructed to appear at an appeals office for the hearing, the ALJ initiates the hearing by placing a conference call to the office or offices where hearing participants are expected. When parties are permitted to participate in the telephone hearing from their residences or places of business, the ALJ does not have their telephone numbers prior to the hearing. Thus, parties participating in this fashion are instructed to call the appeals office *collect* at the scheduled time of the hearing. The appeals office staff accepts the collect calls and records the phone number of the hearing participant. When all expected calls have been received, the ALJ places the conference call to initiate the hearing. The special instructions mailed to hearing participants in advance of the hearing call attention to the differences in time zones which are a factor in many interstate telephone hearings. Calls which are not received are treated according to normal procedures for handling a failure to appear. To obtain another hearing opportunity, parties must demonstrate good cause for their failure to call the appeals office as instructed.

At the beginning of the telephone hearing, the ALJ asks all parties to identify themselves and to disclose whether they are accompanied by others at their location. The ALJ establishes for the record the location and the role of all hearing participants. The oath is administered over the phone to all participants who intend to offer testimony. A reporter or recorder at the location of the ALJ makes a record of the hearing and all parties are informed that such a record is being made. Prior to taking testimony, the ALJ informs the parties of the issues which are the subject of the appeal and of the order in which testimony will be taken and questioning permitted. To facilitate speaker identification, the ALJ insists upon following the established order and the hearing proceeds at all times as a conversation between only two persons. Thus, either the ALJ is questioning one party, or one party is questioning another. At no time should the hearing assume the form of a "free conversation" where everyone feels free to speak at will. Whenever the ALJ or the reporter is unclear about who is speaking, an identification is requested.

IV. *Results of the California Administrative Law Judge Survey*

In order to ascertain the reaction of CUIAB Administrative Law Judges to telephone hearings, the Fair Hearing Project designed a questionnaire which was distributed to the 116 ALJs in the CUIAB system. The questionnaire was administered to insure anonymity of response. Of the 116 questionnaires distributed, 104 were returned, constituting a 90 percent response rate.[22] Since we are essentially describing the population of CUIAB ALJs, there is no need to complicate this report by including significance tests.[23] The ALJs tended to respond to all questions, thus minimizing reporting problems due to missing data.

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[22] The questionnaire was initially drafted by Fair Hearing Project personnel and revised based on the detailed suggestions of the California Unemployment Insurance Appeals Board. Prior to administering the questionnaire, Don Blewett, Chairperson of the CUIAB, wrote to the ALJs informing them that the questionnaire would be sent to them and asking their cooperation. These steps contributed to the high response rate by making it clear to the ALJs that the administration of the questionnaire had CUIAB approval. The questionnaire was administered in the following manner. A packet of questionnaires was mailed to the Senior ALJ in each of the eleven CUIAB appeals offices. Each packet contained one questionnaire for each ALJ assigned to that office, and an envelope for each questionnaire. The Senior ALJs were instructed to distribute the questionnaires and the envelopes and to request that the ALJs answer the questions. Each ALJ upon completion of the questionnaire was instructed to place the questionnaire into the envolope provided and to seal the envelope. The sealed envelope was then to be

The demographic data presented in Table 1 indicate that the ALJs range between 37 and 68 years of age. The average age is 52 years with 66 percent over 50 years old. Ninety-one percent are males. Approximately 17 percent speak a second language, primarily Spanish. In terms of experience, 93 percent have a law degree and 75 percent are admitted to the California bar.[24] Seventy-eight percent have served as ALJs in California for two or more years, while 44 percent have six or more years experience with the CUIAB. Only one respondent reported that he had not held a telephone hearing, while 85 percent reported holdings at least 25 hearings, and 47 percent reported holding over 75 telephone hearings.

In sum, the demographic data reveals that the CUIAB ALJs are mature individuals with legal training and considerable experience in this administrative law setting. Further, these individuals have conducted a sufficient number of telephone hearings to have developed informed judgments with respect to the nature of the problems and benefits afforded by telephone hearings.

A. Attitude Toward Telephone Hearings

The primary concern of the survey was to determine the ALJs' views regarding the use of telephones to conduct hearings. The ALJs were asked to respond to two questions: one aimed at measuring their initial attitude toward the adoption of the new policy of telephone hearings, and the other aimed at assessing their position after conducting telephone hearings. Table 2 reports the results of these questions.

The data indicate that there was an apparent shift in the position of the ALJs' attitudes toward the use of telephones in the hearing process and that this shift was in a positive direction. Thirty percent of the ALJs reported that when telephone hearings were introduced they were skeptical or highly skeptical toward the new policy. Following experience with telephone hearings, only 22 percent reported a negative or strongly negative position, with 68 percent reporting a positive or strongly positive attitude.

In further examining the data, we identified specifically the clear propensity to shift in a positive direction. Of the thirty-one respondents who reported that they were initially skeptical or highly skeptical, eight moved to a neutral position and eleven crossed over to a positive position. Initially,

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returned to the Senior ALJ in the appeals office. When the Senior ALJ had received a sealed envelope from each ALJ in the office, the Senior ALJ was instructed to mail the questionnaires back to the Fair Hearing Project. Thus, the ALJs could be assured that their response would remain anonymous both to the Senior ALJ and to the Fair Hearing Project. Asking the Senior ALJs to collect the sealed envelopes was a further procedure designed to increase the response rate.

[23] Carver, *The Case Against Statistical Significance Testing*, 48 HARV. ED. REV. 378 (1978).

[24] In 1972, the CUIAB established a requirement that all ALJs hired in the future must have a law degree. This requirement was not applied to ALJs currently employed by the CUIAB. Thus, ALJs without law degrees can be assumed to have been employed as ALJs with the CUIAB prior to 1972. The requirement did not specify that the ALJ must be a member of the California Bar. This explains the discrepancy between the percentage of ALJs reporting they have law degrees and the percentage reporting membership in the California Bar.

thirty-two ALJs reported a neutral position; of these, nine moved to a negative position while twenty-two moved to a positive position and one remained neutral. There were forty-one ALJs who reported that they initially were enthusiastic or strongly enthusiastic; only three of these respondents shifted, two to negative positions and one to a netutral attitude.

These data suggest that holding telephone hearings affected a positive change in attitude and an erosion of initial skepticism. This shift may not represent a true shift however, since the questionnaire asked the ALJs to recall their initial attitude. A true measure of their initial attitude would have had to be ascertained at the time of the initial attitude. The shift in attitude, however, is consistent with reports given by CUIAB ALJs in private conversations as well as with our experience with New Mexico appeals referees.

Finally, we felt that by combining the two questions from Table 2 we would obtain a relatively accurate picture of the ALJs' overall attitudes toward the use of the telephone in the hearing process. Table 3 reports the results of combining the two questions. Twenty-two percent are negative; 10 percent are neutral; and 68 percent are positive. In other words, one might argue that two-thirds of the ALJs are supportive of telephone hearings, and, at most, one-third are skeptical or negative. As the analysis below will show, even this one-third are supportive of telephone hearings under certain conditions.

B. Due Process

The primary question that arises with respect to holding telephone hearings concerns due process. In the survey we were interested in determining the extent to which the ALJs perceive that the requirements are or are not met.

Table 4 presents the overall perception of the ALJs with respect to telephone hearings meeting due process. Clearly the majority of ALJs support the position that telephone hearings meet due process requirements. Further analysis reveals that there is a strong association (gamma = 0.82) between a general attitude toward telephone hearings and a perception of whether or not telephone hearings meet due process. In other words, of the 82 percent who believe telephone hearings meet due process requirements, 77 percent of these have a positive attitude toward telephone hearings. Of the 18 percent who believe telephone hearings do not meet due process requirements, 67 percent of these have a negative attitude toward telephone hearings.

As noted in Section II above, one of the primary elements of due process involves the ability of participants to question and rebut adverse testimony and evidence. In order to better understand how this dimension is affected by the telephone, the ALJs were asked to compare telephone hearings with both in-person hearings and simultaneous divided hearings in terms of the confrontation opportunity afforded participants in each hearing mode.[25] As presented in Table 5, the respondents clearly felt that telephone hearings provide a more extensive opportunity for confrontation than is afforded in simultaneous divided hearings. However, when asked to compare in-person hearings with telephone hearings, the respondents were much less certain. Forty-four percent felt that telephone hearings provided a less extensive opportunity for participants to question and rebut than is afforded by in-person hearings. Interestingly, over half (52 percent) of the respondents felt the confrontation opportunity to be approximately the same in both telephone and in-person hearings.

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[25] As noted in Section II previously, telephone hearings have been introduced in California to substitute for in-person appeals primarily in the split hearing situation. Thus, our most important concern was to have the respondents compare telephone hearings with simultaneous divided hearings. In order to obtain a more complete understanding of ALJ reaction to telephone hearings, several questions asked for two evaluations: first, telephone hearings compared to simultaneous divided hearings, and second, telephone hearings compared to in-person hearings.

A second dimension of the due process question involves fairness. Respondents were asked to rate several different types of hearings with respect to fairness to participants (Table 6). The in-person hearing was given the highest mean rating of 6.6, with 72 percent of the ALJs rating the in-person hearing "completely fair." The telephone hearing with all parties participating over the phone received the second highest mean rating, 5.2, with 73 percent of the ALJs rating is 5 or higher. The telephone hearing in which one party participates in person before the ALJ and the other party participates by phone received a mean rating of 5.0, only slightly lower than the telephone hearing with all parties on the phone. The ALJs rated the simultaneous divided hearing as least fair, giving it a mean rating of 3.8, with 70 percent rating it 4 or less. With respect to due process, it seems clear that the ALJs see the in-person hearing as most preferable and the simultaneous divided hearing as least preferable, with the telephone hearing in-between.

C. Documents

As noted in Section III previously, California procedures require that, prior to telephone hearings and simultaneous divided hearings, the case files are reviewed to identify file records which must be copied and mailed to the participants prior to the hearing. Also, participants are asked to submit in advance any documents they wish to enter into the record. A series of questions was designed to evaluate the ALJs' perception of the use of documents in telephone hearings.

The results of these questions are presented in Table 7. The responses suggest that the use of documentary evidence in telephone hearings is not a major problem. The majority of the ALJs indicated that few new documents are entered into the record for the first time during the hearing; and, when they are introduced, the documents can be read into the record without the necessity of a continuance. Also, the vast majority of ALJs responded that when documents are mailed to phone hearing participants, they have the documents ready for reference during the hearing. Further, 76 percent of the respondents indicated that when identifying documents for submission into the record, phone participants seem to follow easily the procedure for identifying documents. These answers support the conclusion that the above described procedures developed by the CUIAB for handling documentary evidence in phone hearings are successful. Yet 74 percent of the ALJs felt that the telephone does make the discussion of documentary evidence during the hearing more difficult than with the in-person hearing. Again, this is consistent with the position that the telephone hearing has more difficulties than the in-person hearing.

D. Witness Evaluation

Perhaps the most common question arising with respect to alternative types of hearings is the following: How can the ALJ determine the credibility and demeanor of the participants when the ALJ cannot see them? The simultaneous divided hearing does not provide the ALJ with face-to-face contact with the distant party, seemingly the most important means of determining demeanor and credibility. Social scientific experiments have suggested that in-person contact may not be as important for these determinations as is typically assumed by the legal community.[26]

A series of questions was designed to test ALJ attitudes toward witnesses in telephone hearings. The ALJs were asked what information they could detect concerning witnesses from the audio-only cues present in a telephone hearing. As reported in Table 8, the ALJs saw themselves as least successful in judging the truthfulness of the witness; however, even here only 19 percent replied that they could rarely or never determine witness truthfulness. A majority of the respondents indicated that they can determine in a telephone hearing whether the witness at the distant location is alone or not and whether the witness is who he/she claims to be. The ALJs are somewhat less sure of their ability to detect whether or not witnesses are being coached. These findings suggest that the ALJs perceive audio-only cues (via telephone) do not provide complete information about all aspects of witnesss testimony. Still, while some doubt remains, the majority of the ALJs believe that in the majority of the cases they can make determinations about witness characteristics from the audio-only cues.

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[26] Law is a field where in-person contact has for centuries been the norm. For instance, deviations from in-person contact have often been frowned upon and a set of beliefs has developed regarding the necessity for in-person contact to evaluate issues such as witness demeanor and witness credibility. *See, e.g.*, Mattox *v.* United States, 156 U.S. 237 (1895). The Court stated in dictum:

> The primary object of (the right of confrontation) . . . was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether his is worthy of belief.

However, a considerable amount of research has been done testing the ability to detect lying. Various studies have shown that observers cannot accurately detect lying. *See, e.g.*, Ekman & Friesen, *Detecting Deception from Body or Face,* 29 J. OF PERSONALITY & SOC. PSYCH. 288 (1974); Maier & Janzen, *The Reliability of Reasons Used in Judgments of Honesty and Dishonesty,* 25 PERCEPTUAL AND MOTOR SKILLS 141 (1967); Maier & Thurber, *Accuracy of Judgments of Deception When An Interview is Watched, Heard and Read,* 21 PERSONNEL PSYCH. 23 (1968). Maier and Thurber further report that subjects were more accurate in an audio-only condition, whereas the face-to-face or live conditions actually reduced the subjects' ability to detect deception. *Id.* at 29–30. In a related study, Hocking found a similar discrepancy across modes: In the audio-only mode, subjects were 61.8 percent accurate, whereas in the video mode, only 58.5 percent were accurate. J. Hocking, Detecting Deceptive Communication From Verbal, Visual, and Paralinguistic Cues: An Exploratory Experiment, (1976) (unpublished doctoral dissertation, Michigan State University). Bauchner summarizes the results of the study conducted by Maier and Thurber and the study conducted by Hocking. J. Bauchner, Detecting Deception: The Role of Various Forms of Information (1976), (unpublished master's thesis, Michigan State University). Bauchner offers the following statement explaining these results: the fewer available behavioral cues, the higher the accuracy of the observer's detection of deception. Two explanations of these results are possible, the first involving distraction, the second, message overload. Distraction refers to extraneous behavioral cues, especially visual cues. Bauchner explains, "[b]ehavioral cues which are extraneous to deception may distract attention from cues which are potential indicators of its occurrence, thus resulting in inaccurate truth/deception attiributions." Whereas an overabundance of behavioral cues may lead to distraction, they also may lead to message overload. As both verbal and nonverbal cues increase, so do the data the observer must process. In a face-to-face situation with both visual and paralinguistic cues, an observer's accuracy in detecting deception may be low due to the problems of distraction, message overload or both. It follows that the audio-only mode would entail fewer distractions and less overload because the visual channel is eliminated. Thus, the results of the studies of both Maier and Thurber, and Hocking can be explained. *See also,* Miller, *Using Videotape in the Courtroom: A Four-Year Test Pattern,* 55 U. OF DET. J. OF URB. L. 655, 692-93 (1978). The implications of the results of these studies on the teleconferenced administrative hearing are clear: a hearing officer may actually be more accurate in detecting deception in the audio-only mode than in a face-to-face situation.

In order to focus on the issues of witness demeanor and credibility, the ALJs were asked to make comparisons of the telephone hearing with the simultaneous divided hearing and the in-person hearing with respect to judgments concerning witnesses. These results are presented in Tables 9 and 10. The ALJs perceived that judging witness demeanor and credibility in person was easier than over the telephone. Likewise, the ALJs perceived the telephone as an easier mode for judging these characteristics than the simultaneous divided hearing. An interesting feature of these particular questions is the percentage of ALJs who reported the telephone hearings more difficult than the simultaneous divided hearing for judging witness demeanor (32 percent) and witness credibility (25 percent), even though the simultaneous divided hearing does not provide the ALJ with any direct face-to-face contact with the witness at the distant location. It appears that some ALJs are more confident in the judgment of these issues when the hearing participants have appeared in person before an agent state appeals referee even though they themselves do not conduct the hearing with such participants.

Another dimension which impacts on witness presence at a hearing involves the seriousness with which the participant regards the process. It is conceivable that the physical and psychological separation of individuals in a telephone hearing may create the impression in certain parties that the hearing is not really a serious legal proceeding. When asked about this issue, a majority of ALJs (51 percent) responded that they perceived no difference among the three types of hearings with regard to the appropriateness of participant response. Among these perceiving a difference, the in-person hearing was seen as producing a more appropriate response than the telephone hearing, while the telephone hearing was seen to produce a slightly more appropriate participant response than the simultaneous divided hearing. Again, the 23 percent who perceived the telephone hearing as producing a less appropriate participant response than the simultaneous divided hearing seem to reflect the preference of some ALJs that participants appear in person before some agent state appeals referee.

E. Hearing Structure.

A number of questions have arisen concerning the impact of telephone conferencing on hearing dynamics. The absence of visual cues in the telephone hearing requires the ALJ to be more conscious of the order of testimony and identification of speakers than is the case with the in-person hearing. A series of questions was designed to probe the ALJs' concepts of the administrative hearing and perceptions of the changes in structure which result from the telephone hearing innovation.

The ALJs were asked to compare the amount of preparation time and decision writing time involved in telephone hearings with in-person hearings and with simultaneous divided hearings. As indicated in Table 12, 64 percent of the respondents felt that telephone hearings require more extensive preparation time than in-person hearings. This probably reflects the need to review the file prior to the telephone hearing in order to identify documents which are copied and mailed to the participants. Even though a file must be reviewed prior to a simultaneous divided hearing, a majority of the ALJs still felt that the preparation time required for a telephone hearing is more extensive. This suggests that the file review for a telephone hearing is practiced as a more demanding requirement than the file review prior to simultaneous divided hearings. As Table 13 indicates, the majority of respondents saw no difference in the decision writing time involved in any of the hearing modes. Interestingly, 21 percent of the respondents replied that telephone hearings require less decision writing time than simultaneous divided hearings. Evidently the ability of the ALJ to take all testimony in the telephone hearing and to eliminate the need to review an agent state hearing record reduces decision writing time in the telephone hearing compared to the simultaneous divided hearing.

As reported in Table 14, the ALJs do perceive that the telephone hearing requires more structure to produce an orderly hearing than is the case with the in-person appeal. This finding reflects the greater attention the ALJ must spend in the telephone hearing to establishing and maintaining a clearly defined sequence of testimony and questioning.

The data presented in Table 15 shows that the ALJs perceive the process of asking questions and obtaining information needed to make a decision to be more difficult over the telephone than in person. This is a consistent and not unexpected result. When asked to compare telephone and simultaneous divided hearings, a majority of the ALJs responded that the telephone was the easier mode. As was the case with previous questions concerning witness demeanor and credibility, 23 percent of the respondents indicated that the simultaneous divided hearing was preferable to the telephone hearing. As we noted earlier, this finding seems to suggest that some ALJs prefer that the participant at the distant location appear in person before some ALJ who can ask questions, obtain information, and determine witness demeanor and credibility. This preference reveals a willingness on the part of a minority of the ALJs to give up asking such questions themselves if the alternative is the telephone hearing and the loss of the in-person cues.

Finally, as revealed by Table 16, the ALJs reported that multiparty hearings are more difficult to manage over the telephone compared with in person. Twenty-one percent noted that multiparty hearings were no more difficult to manage over the telephone than in person. Somewhat surprisingly, 5 percent answered that multiparty hearings are actually easier to manage over the telephone. This last finding might indicate that for some ALJs the greater structure required to conduct telephone hearings produces as a side benefit a more orderly proceeding which makes conducting multiparty hearings easier. For example, one of the side benefits of a more structured telephone hearing is that the more controlled conversation inhibits free interruptions.[27]

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[27] Fewer interruptions might also result from the voice-activated nature of the teleconferencing equipment and the resulting "lock-out" which occurs. *See* a discussion of this following.

F. Technical Difficulties with Telephone Hearings

Beyond issues concerning the legal and procedural nature of the administrative hearing, the telephone innovation introduces potential procedural and technical problems with the phone equipment itself. The ALJs were asked to rate the seriousness of a series of technical telephone problems which had been brought to our attention during observations of CUIAB telephone hearings and subsequent discussions with various ALJs.

As indicated in Table 17, the technical problems rated most serious involved static on the phone line and fluctuations in voice levels during the hearing. Frequently telephone hearings involve long distance and multiparty connections. The quality of telephone transmission varies tremendously in different locations; and the strength of signals can be affected by the number of parties connected into the conference.

Another problem involves bilingual hearings requiring a translator. Fifty-two percent of the respondents noted this as a moderate or serious problem. Even in-person hearings are more difficult when a translator is required. Inevitably, telephone hearings requiring an interpreter involve both the problems inherent in the translation and the normal complications of a telephone hearing.

Forty-nine percent of the ALJs rated as a moderate or serious problem the difficulty of identifying who is speaking during multiparty hearings when one or more persons are on the conference call. This finding emphasizes the necessity for agencies adopting telephone hearings to prepare and train appeals referees regarding procedures to cope with this issue.

Teleconferencing units must be engineered so that voice-activated microphones are intrinsic to the system. This feature means that the person who is speaking has sole control of transmission and that other parties are "locked out." Other parties can gain control of transmission only by speaking when the other party pauses or by speaking louder and thus gaining control of the channel. In our conversations with ALJs the impression was created that the lock-out nature of the teleconferencing unit was a major difficulty; and 44 percent of the respondents rated this as a moderate or serious problem. However, over 50 percent replied that the lock-out nature of the equipment was a minor problem or no problem whatsoever. This suggests that the majority of ALJs utilize procedures to avoid this difficulty. For instance, should a participant monopolize the phone line with a long answer, the ALJ can immediately instruct the party that shorter, more direct answers will be beneficial to the party in building a case.

The responses indicate that the procedures designed by the CUIAB requiring certain parties to call collect into the appeals office to initiate certain telephone hearings are workable and present no serious problem. Similarly, potential difficulties resulting from differences in time zones are not perceived to be a serious problem. Still, with both these issues, approximately one-third of the respondents reported a moderate problem with call-in procedures and time zones. This again emphasizes the need for clearly articulated and well-defined solutions to these procedural questions.

Over 60 percent of the respondents indicated that disconnections of telephone lines during hearings were a minor problem or no problem whatsoever. Realizing that certain disconnections may occur because parties to telephone hearings voluntarily hang up and refuse to continue the hearing, we asked this question directly. Ninety percent of the ALJs reported that this was simply not a problem. Evidently, once telephone hearing participants are involved in the hearing they continue until the hearing is completed.

G. Choice of Hearing Mode

A final set of questions was designed to provide the ALJs an opportunity to state their overall views of telephone hearings and to indicate their preference for hearing modes in different circumstances.

The ALJs were asked to respond to the following question: "Generally speaking, do you believe that you can gather over the telephone the information necessary to make your decision?" This was the only question in the entire instrument which received a unanimous response. All the ALJs responded affirmatively, that they could obtain over the telephone the information needed to reach a decision. One interpretation is that this is the only response possible to this question. In other words, any ALJ who could not get the needed information in a particular telephone hearing could not reach a decision in that case and would have to demand either another telephone hearing on an in-person hearing. A basic requirement in all cases is to elicit the evidence necessary to arrive at a proper decision. Still, it is conceivable that there could have been certain ALJs who were adamently opposed to telephone hearings and who felt compelled by CUIAB policy to accept telephone hearings even though they believed they could not obtain the information necessary for a responsible decision. The fact that no negative responses were received to this question is, at least, an indication that all ALJs in the California system feel they can conduct telephone hearings to a successful conclusion.

The data in Table 18 reflects the overall position of the ALJs regarding telephone hearings. The vast majority of ALJs (97 percent) believe than an in-person hearing ought to be held whenever possible. When faced with a choise between a simultaneous divided hearing and a telephone hearing, the clear preference (89 percent) is for a telephone hearing. Thus, even a majority (61 percent) of those who expressed a negative current attitude to telephone hearings (Table 2) preferred telephone hearings when the option was to hold a simultaneous divided hearing.

Finally, a majority of the ALJs (56 percent) believed that the extensive use of telephone hearings in intrastate appeals is desirable. This clearly shows that the CUIAB ALJs perceive the telephone hearing as an appropriate innovation in the intrastate appeals setting and not just an innovation which should be reserved only for the interstate appeals setting.

V. *Conclusion*

In a world of unlimited resources, all administrative fair hearings would be conducted in person with all parties present. The split hearing situation occurs precisely because it is not economically feasible always to bring hearing participants together when they are separated by substantial distances. The solution thus far has been to hold two separate in-person hearings in a simultaneous divided manner. While the simultaneous divided hearing is one approach to solving this problem, it has been attacked as an unsatisfactory solution primarily on the grounds of due process. An alternative solution which is just coming into use is the telephone hearing. This article has sought to report on the development and nature of telephone hearings as they occur in California as well as to present a summary of some of the views of the CUIAB Administrative Law Judges with respect to telephone hearings.

The California experience clearly demonstrates that telephone hearings can be successfully conducted and that teleconferencing can receive judicial support as a creative alternative to the due process problems of the split hearing. The survey results lead to two general conclusions: first, the findings strongly underscore the position that whenever possible hearings should be held in person; and second, the data suggest that telephone hearings are a desirable method of conducting hearings in the split hearing situation, both interstate and intrastate. The ALJs consistently maintained these preferences for hearing modes across several dimensions of the hearing process. The results indicate that the procedures designed by the CUIAB to implement phone hearings are workable, and that, while technical problems are experienced with the phone equipment, these problems tend to be manageable.

Several states are investigating teleconferencing as a possible method for improving their hearing process.[28] This had led to a need for more extensive scientific examination of telephone hearings. We are currently involved in a study of unemployment insurance hearings conducted by the New Mexico Department of Human Services.[29] A field experiment is planned to compare

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[28] For instance, in the recent case of *Okikun* v. *Orbeck*, No. 76–8627 (D. Alaska, filed Nov. 22, 1976), the Alaska Department of Labor was sued by the Alaska Legal Services Corporation. This class action suit tested the constitutional and statutory validity of the Department's method of determining the location of unemployment insurance appeal hearings. Prior to this suit, Alaska held in-person appeals hearings at only five locations, namely, the State's largest communities of Anchorage, Fairbanks, Juneau, Ketchikan, and Nome. Appellants wishing to have an in-person hearing had to travel to one of these five locations. The option was to answer written interrogatories. The Alaska Legal Services Corporation contested on due process grounds that participant travel to these five limited locations constituted duress and that the written interrogatories were inadequate. The Alaska Department of Labor and the Alaska Legal Services Corporation reached a negotiated agreement wherein the number of sites for in-person hearings would be expanded from five locations to eleven, and telephone hearings would be provided in other instances. The U.S. Department of Labor supported this agreement, noting that, in the view of the Department of Labor, written interrogatories do not provide "an opportunity for a fair hearing" as required by §303(a)(3) of the Social Security Act. Letter from Lawrence H. Weatherford, Jr., Administrator, Unemployment Insurance Service, Department of Labor, to Ronald W. Lorensen, Assistant Attorney General, State of Alaska (April 15, 1977). Travel to all communities in Alaska to hold appeals hearings presents enormous difficulties since there are many remote communities in Alaska with between 50 and 500 residents. Frequently the only means of transportation to these areas involves specially chartered flight arrangements. Additionally, weather hazards and the unavailability of lodging for visitors makes hearing officer travel to many communities virtually impossible. On August 18, 1978, the negotiated agreement was accepted by the Alaska Superior Court.

[29] The fifth largest state in the Union, New Mexico, has a population of only 1.3 million concentrated on a northwest-southeast diagonal that centers at Albuquerque, in Bernalillo County, where 32 percent of the population resides. The remainder of the state is largely rural, and 65 percent of the locations covered regularly by the Department of Human Services have fewer than 2500 residents. All unemployment insurance appeals in the state (approximately 5,000/year) are handled by eight Employment Services Division appeals referees who cover the state in four circuits. This places a substantial and costly travel burden on the referees. For instance, in a typical trip in the southeast quadrant, Chief Appeals Referee Dean Harvel conducted 32 hearings in nine cities, logged about 700 miles, and spent more than 14 hours on the road in a 3-day period. A major application of teleconferencing in New Mexico involves utilizing telephone hearings to handle appeals in distant locations with a low volume of hearings. For this reason, the Fair Hearing Project investigation in New Mexico has focused on the comparison between telephone hearings and in-person hearings.

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in-person hearings and telephone hearings across three dimensions: perceived due process, cost-effectiveness and effects on hearing quality. It is hoped that the results of this experiment will provide policymakers with scientific data on which to make decisions with respect to the conditions under which the telephone hearing is indeed a satisfactory alternative.

Prepared by Employment and Training Administration

TABLE 1
Demographic Description of CUIAB ALJs

AGE	N	PERCENT
37-45	17	16
46-55	45	43
56-68	37	36
Not Reporting	5	5
Total	104	100

SEX	N	PERCENT
Male	95	91
Female	8	8
Not Reporting	1	1
Total	104	100

Do you have a law degree?

	N	PERCENT
Yes	97	93
No	7	7
Total	104	100

Are you admitted to the California Bar?

	N	PERCENT
Yes	78	75
No	25	24
Not Reporting	1	1
Total	104	100

Are you bilingual?

	N	PERCENT
Yes	18	17
No	84	81
Not Reporting	2	2
Total	104	100

Second Language

	N
Spanish	8
Yiddish	4
Others	10
Total	22

How long have you been an Administrative Law Judge with the California Unemployment Insurance Appeals Board?

	N	PERCENT
2 Years or less	23	22
3-5 Years	29	28
6-10 Years	21	20
Over 10 Years	25	24
Not Reporting	6	6
Total	104	100

How many telephone hearings have you held?

	N	PERCENT
Fewer than 25	16	15
25-75	39	38
Over 75	49	47
Total	104	100

TABLE 2
Attitude Toward Telephone Hearings

PRIOR TO HOLDING HEARINGS*		AFTER HOLDING HEARINGS**	
Highly Skeptical	5%	Strongly Negative	6%
Skeptical	25%	Negative	16%
Didn't Care	31%	Neutral	10%
Enthusiastic	33%	Positive	48%
Strongly Enthusiastic	6%	Strongly Positive	20%
	100%		100%
	(N = 104)		(N = 104)

*QUESTION: When the policy of using telephone hearings as a substitute for simultaneous divided hearings was introduced, how would you describe your reaction?

**QUESTION: Now that you have actually held telephone hearings, what is your present attitude?

TABLE 3
Constructed Position Toward Telephone Hearings

Negative	11%
Negative Shift	11%
Neutral	10%
Positive Shift	32%
Positive	36%
	100%
	(N = 104)

NOTE: This Table was constructed by combining the responses of Table 2. Those who reported that they were initially highly skeptical or skeptical and remained negative or strongly negative are scored here as "negative." Those who reported that the initially didn't care, were enthusiastic, or stongly enthusiastic and changed to negative or stongly negative are scored here as "negative shift." Those who reported that they were initially highly skeptical, skeptical, didn't care, enthusiastic, or strongly enthusiastic and responded that they were neutral after conducting phone hearings are scored here as "neutral." Those who reported that they were initially highly skeptical, skeptical or didn't care and changed to positive or strongly positive are scored here as "positive shift." Those who reported that they were initially enthusiastic or strongly enthusiastic and remained positive or strongly positive are scored here as "positive."

TABLE 4
Perception that Telephone Hearings Meet Due Process

Overall, do you believe that telephone hearings meet due process requirements?

Yes	82%
No	18%
	100%
	(N = 104)

Prepared by Employment and Training Administration

TABLE 5
Perception of the Opportunity for Confrontation in Telephone Hearings Versus In-Person and Simultaneous Divided*

The Opportunity for Participants to Qestion and Rebut In Phone Hearings Is	Hearing Type	
	In-Person	Simultaneous Divided
More extensive than	4%	87%
About the same as	52%	9%
Less extensive than	44%	4%
	100%	100%
	(N = 104)	(N = 103)

*Question: Confrontation has been specified by the courts to be an important element of due process in administrative fair hearings. In your opinion, the opportunity for participants to question and rebut in phone hearings is:

TABLE 6
Ratings of Hearing Types with Respect to Fairness to Participants*

	NOT AT ALL FAIR						COMPLETELY FAIR	% TOTAL	N =	AVERAGE
	1	2	3	4	5	6	7			
1. In-Person Hearing				1%	4%	23%	72%	100%	104	6.6
2. Simultaneous Divided Hearing	5%	16%	17%	32%	19%	9%	2%	100%	104	3.8
3. Telephone Hearing with one party present with ALJ	4%		8%	18%	26%	36%	8%	100%	103	5.0
4. Telephone Hearing with all parties over the phone	1%	5%	5%	16%	25%	30%	18%	100%	102	5.2

*QUESTION: Please rate each of the following hearing modes in terms of fairness. For each mode, assume that number 1 on the scale means that the process is not at all fair to the participants and that 7 means that the process is completely fair to the participants. For each item, place in the box at the far right the number from the scale which reflects where you place that item on the scale.

TABLE 7
Perceptions of Document Use in Telephone Hearings

1. *Submission of Documents Made Prior to Hearing:*

Generally parties submit all documents prior to the phone hearing; few new documents are entered into the record for the first time during the hearing	65%
Parties rarely submit all documents prior to the phone hearing; many new documents are entered into the record for the first time during the hearing	35%
	100%
	(N = 102)

2. *Submission of New Documents Over the Telephone:*

New documents submitted during phone hearings can generally be read into the record without the necessity of a continuance	87%
New documents submitted during phone hearings generally cannot be read into the record without the necessity of a continuance	13%
	100%
	(N = 101)

3. *Mailed Documents Ready for Reference During Hearing:*

In phone hearings when documents are mailed to phone participants, do you find that the people have them available for reference?

Always/Often	92%
Occasionally	8%
Rarely/Never	0%
	100%
	(N = 104)

4. *Document Identification for the Record:*

When identifying documents for submission into the record, do phone participants seem to follow easily the procedure for identifying the documents:

Always/Often	76%
Occasionally	17%
Rarely/Never	7%
	100%
	(N = 103)

TABLE 7 — Cont.

5. *Discussing Documents Over the Telephone:*
When discussing documents which have been entered into the record, does the telephone make this discussion:

More difficult than in-person	74%
About the same	24%
Easier than in-person	2%
	100%
	(N = 104)

TABLE 8
Perceived Ability to Detect Information About Hearing from Audio-Only Cues?*

	Witness Truthfulness	Whether Witness Is Alone Or Not	Whether Witness Is Who He/She Claims To Be	If Witness Is Being Coached
Always/Often	37%	53%	64%	45%
Occasionally	44%	27%	9%	26%
Rarely/Never	19%	20%	27%	29%
	100%	100%	100%	100%
	(N = 105)	(N = 105)	(N = 105)	(N = 105)

*Question: In telephone hearings, witnesses establish their presence as a voice. From these audio cues are you able to adequately detect the following?

TABLE 9
Perception of Difficulty of Judging Witness Demeanor Over the Phone Versus In-Person and Simultaneous Divided*

Difficulty of Judging Demeanor Over the Telephone Is	Hearing Type	
	In-Person	Simultaneous Divided
More difficult than	92%	32%
About the same as	7%	28%
Easier than	1%	40%
	100%	100%
	(N = 104)	(N = 104)

*Question: Would you say that conducting hearings over the phone makes judging witness demeanor:

TABLE 10
Perception of Difficulty of Judging Witness Credibility Over the Telephone Versus In-Person and Simultaneous Divided*

DIFFICULTY OF JUDGING WITNESS CREDIBILITY OVER THE PHONE IS	HEARING TYPE	
	In-Person	Simultaneous Divided
More difficult than	86%	25%
About the same as	14%	30%
Easier than	0%	45%
	100%	100%
	(N = 104)	(N = 104)

*QUESTION: Often the hearing process requires the Administrative Law Judge to evaluate credibility. Would you say that conducting hearings over the phone makes the determination of witness credibility:

TABLE 11
Perception of Clients Responding to the Official Nature of Hearings Over the Phone Versus In-Person and Simultaneous Divided*

PARTICIPANTS IN PHONE HEARINGS RESPOND	HEARING TYPE	
	In-Person	Simultaneous Divided
More appropriately than	4%	26%
About the same as	51%	51%
Less appropriately than	45%	23%
	100%	100%
	(N = 104)	(N = 104)

*QUESTION: In your experience with phone hearings, to what extent do participants on the phone respond appropriately to the official nature and seriousness of the hearing?

TABLE 12
Perception of Preparation Time for the Telephone Hearing Compared to In-Person and Simultaneous Hearing*

PREPARATION TIME FOR TELEPHONE HEARING IS:	HEARING TYPE In-Person	Simultaneous Divided
More extensive than	64%	52%
No difference	36%	41%
Less extensive than	0%	7%
	100%	100%
	(N = 104)	(N = 104)

*QUESTION: Preparation time required to conduct a telephone hearing successfully is:

TABLE 13
Perception of Decision Writing Time for a Telephone Hearing Compared to In-Person and Simultaneous Hearings*

DECISION WRITING TIME FOR A TELEPHONE HEARING REQUIRES	HEARING TYPE In-Person	Simultaneous Divided
More time than	10%	5%
No difference	90%	74%
Less time than	0%	21%
	100%	100%
	(N = 104)	(N = 104)

*QUESTION: On the average, the decision-writing required for a telephone hearing takes:

TABLE 14
Perception of Level of Structure Necessary for an Orderly Hearing Process, Telephone Hearing Versus In-Person*

Phone hearing requires more structure than in-person	65%
About the same structure	35%
Phone hearing requires less structure than in-person	0%
	100%
	(N = 104)

*QUESTION: An important function of the administrative law judge is to provide a structure for an orderly hearing process. Which of the following best describes your experience of phone hearings compared with in-person hearings:

TABLE 15
Perception of Difficulty of Asking Questions and Obtaining Information in Phone Hearings Versus In-Person and Simultaneous Divided*

Asking Questions and Obtaining Information	Hearing Type: In-Person	Hearing Type: Simultaneous Divided
Over the phone is more difficult than	69%	23%
About the same as	29%	20%
Over the phone is easier than	2%	57%
	100%	100%
	(N = 104)	(N = 104)

*Question: It is important for an Administrative Law Judge to be able to get all the information needed to reach a decision into the record. How do you rate the process of asking questions and obtaining needed information in phone hearings? Do you believe that asking questions and obtaining needed information:

TABLE 16
Perception of Difficulty of Managing Multiparty Hearings Over the Phone Versus In-Person*

Multiparty hearings are easier to manage on the phone	5%
About the same	21%
Multiparty hearings are more difficult to manage on the phone	74%
	100%
	(N = 104)

*Question: The more parties present at any hearing, the more attention the Administrative Law Judge may have to give to establishing procedures and maintaining an orderly process. Which of the following seems to you most accurate when comparing your experience of multiparty hearings in person with multiparty hearings over the phone:

TABLE 17
Evaluation of Technical Difficulties Related to Telephone Hearings

QUESTION: In telephone hearings, several different types of technical difficulties have occurred. Below is a list of problems which have been mentioned.* For each item, select the response which seems most appropriate.

	A.	B.	C.	D.	E.	F.	G.	H.	I.
	PROCEDURES	TIME ZONES	DISCONNECT	STATIC	LOCKOUT	VOICE LEVEL	INDIVIDUAL IDENTIFICATION	HANG-UP	TRANSLATOR
No Problem	22%	28%	30%	11%	42%	15%	14%	90%	32%
Minor Problem	41%	37%	31%	19%	14%	17%	37%	9%	16%
Moderate Problem	32%	30%	32%	36%	26%	46%	37%	0%	34%
Serious Problem	5%	5%	7%	34%	18%	22%	12%	1%	18%
	100%	100%	100%	100%	100%	100%	100%	100%	100%
	(N = 104)	(N = 104)	(N = 104)	(N = 104)	(N = 102)	(N = 104)	(N = 104)	(N = 104)	(N = 104)

*a) Failure of participants to understand the procedures for phoning into the Appeals Office to initiate the hearing.
b) Difference in time zones across the U.S.A. and resultant confusion.
c) Phone lines being disconnected during the hearing.
d) Static or noise on the line.
e) Lock-out nature of the Western Electric portable teleconferencing unit, such that the voice-activated microphone does not permit interruptions of more than one person to speak at a time.
f) Fluctuations in voice level during phone conversation or interrupting voice because of equipment.
g) Difficulty in identifying who is speaking during multiple-party hearings when more than one person is on the conference call.
h) Parties on the phone hanging up and not continuing the hearing.
i) Bilingual hearings requiring a translator.

TABLE 18
Choice of Hearing Mode

1. Whenever possible, hearings ought to be held in person.

Agree	97%
No Opinion	2%
Disagree	1%
	100%
	(N = 104)

2. Telephone hearings are a desirable substitute for simultaneous divided hearings.

Agree	89%
No Opinion	2%
Disagree	9%
	100%
	(N = 104)

3. In California, extensive use of telephone hearings in intrastate hearings is desirable.

Agree	56%
No Opinion	6%
Disagree	38%
	100%
	(N = 104)

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Report 328-33 **Labor Dispute** **LD-125.15-19**
March 1980

California

COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION TWO

July 30, 1979

NATIONAL BROADCASTING CO., INC. v. CALIFORNIA UEMPLOYMENT INSURANCE APPEALS BOARD

Determination of existence: Continuance of employer-employee relationship

Labor dispute 125.15

The union, representing technical employees, called a countrywide strike against a national broadcasting and television network after negotiations proved fruitless and the collective bargaining agreement expired on March 31. Picket lines were established, but the employer continued operations with nonstriking personnel. Incidents of sabotage occurred throughout the Nation, but not in California. On April 2, the Federal mediator set April 8 for resumption of operations. The union agreed, advising employer on April 5 that members would return on April 7. On April 6, the employer notified the union of rejection unless assured that sabotage would cease and the contract would be reasonably extended. The union, in turn, refused. On April 7, some employees tried (but were not allowed) to return to work. The picket line continued until a new agreement was reached on May 22; employees returned to work on May 24. Benefits were denied by the agency from March 31, the offer of return on April 7 deemed not bona fide. This decision was reversed by the administrative law judge (the cause of unemployment thereafter regarded as employer's rejection of the unconditional offer of return to work) and affirmed by both the appeals board and superior court. *Held*, reversed, the cause of unemployment as of April 7 still remained the labor dispute and did not cease until the end of the dispute itself because there had not been a complete severance of the employment relationship. A strike suspends, but does not terminate the relationship; the employees had not been replaced nor had the relationship been otherwise terminated.

Findings of Fact and Reasoning

The National Broadcasting Company, Inc. (NBC) sought a writ of mandate in the Superior Court of Los Angeles County to require the California Unemployment Insurance Appeals Board (the board) to vacate a decision awarding unemployment insurance benefits to certain of NBC's California-based employees. The superior court denied relief. NBC appeals. We reverse.

March 31, 1976, was the expiration data of the then-current collective bargaining agreement between NBC and the National Association of Broadcast Employees and Technicians (NABET). The latter is a labor organization representing NBC's technical employees nationwide.

Negotiations on a new agreement began in February 1976. NABET's strategy was to press for a new contract prior to March 31, 1976, in order to obtain leverage in its negotiations with other employers. When no agreement appeared to be forthcoming, the Federal Mediation and Conciliation Service suggested extension of the current agreement to May 1, 1976, and a resumption of bargaining on April 19, 1976. NBC agreed, but NABET rejected the proposal and called a nationwide strike against NBC on March 31, 1976, after giving NBC 4 hours' notice.

Prepared by Employment and Training Administration

Picket lines were established, and NBC began to man its facilities with nonstriking personnel. During the ensuing days, incidents of sabotage of NBC facilities occurred across the country. None of the sabotage, however, occurred in California.

On April 2, 1976, the Federal mediator advanced the date for resumption of negotiations to April 8. This earlier date was welcomed by NABET, which then notified NBC by telegram that it was directing its members to return to work on April 7, 1976.

On April 6, 1976, however, NBC notified NABET that it would not agree to the return of the striking employees until it received certain assurances from NABET concerning the prevention of further sabotage and a reasonable and certain period of extension of the present contract with its strike notice provision. NABET, although eschewing any connection with the sabotage, refused to give such assurances.

Acting on instructions from NABET, certain NBC employees began to contact NBC to obtain work assignments but were refused. On April 7, a group of approximately 15 NABET members attempted to report for work at the NBC Burbank facility. They were denied access by an NBC guard, who referred them to NBC's telegram of April 6.[1] One NABET member, who reported to work at the San Francisco facility, worked approximately 15 minutes but was asked to leave upon the instructions of NBC supervisory personnel.

NABET maintained its picket lines until a new labor agreement was executed by the parties on May 22. The employees returned to work on May 24, 1976.

During the period April 7 to May 24, certain striking employees applied for unemployment insurance benefits in California. The California Employment Development Department denied the applications on the basis that the applicants had voluntarily left work to participate in a strike.

The employees appealed that determination and, following an administrative hearing, the decision was that NBC's refusal to permit the employees to return April 7 made the latter eligible for benefits. The board affirmed that decision.

Section 1262 of the Unemployment Insurance Code provides

> An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed.

The stated legislative purpose of the Unemployment Insurance Program is to reduce *involuntary* unemployment and to relieve the hardship on persons who *through no fault of their own* become unemployed. (Unemp. Ins. Code, 100.)

Section 1262, specifically dealing with labor disputes, manifests the State's desire to maintain neutrality (*Matson Terminals, Inc.* v. *Cal. Emp. Com.*, 24 Cal.2d 695 [LD-V8-2-p29, BSSUI]) and not to require the employer to subsidize, through contributions to the fund, the use of the strike as an economic weapon against him.

---

[1] The employees who appeared were not reporting for their regularly scheduled shifts. It was stipulated at the hearing, however, that NBC would have denied them access in any event.

Case law applying section 1262 to various factual situations has developed along two general lines, i.e., cases dealing with the issue of the voluntariness of the employees' initial departure and cases dealing with the continuation of ineligibility after a voluntary departure.

In *Bodinson Mfg. Co.* v. *California E. Com.*, 17 Cal.2d 321 [Ld-V4-11-p99, BSSUI], nonstriking employees who refused to cross picket lines of striking employees were held to have voluntarily absented themselves from their jobs. In a later case, *Bunny's Waffle Shop* v. *Cal. Emp. Com.*, 24 Cal.2d 735 [LD-V8-6-p17, BSSUI], where the employer "struck the first blow" by reducing wages and altering working hours in an effort to get the union to bargain with an employers' association, employees who walked out were found to be eligible for unemployment benefits because their leaving was considered to be involuntary.

After these early decisions, came two cases dealing with strikes against selected employers by unions engaged in industry-wide bargaining. *McKinley* v. *California Emp. Etc. Com.*, 34 Cal.2d 239 [LD-465.3-1, BSSUI] and *Gardner* v. *State of California*, 53 Cal.2d 23, both held that in such a situation it was proper for employers to take a unified stance — that a strike against one was a strike against all. Employees locked out by nonstruck employers were not eligible for unemployment benefits.

In tracing the development of the case law on the issue of whether the trade dispute is the continuing cause of the unemployment of workers who concededly left their employment voluntarily, the case of *Mark Hopkins, Inc.* v. *Cal. Emp. Com.*, 24 Cal.2d 744 [LD-V-8-1-p15, BSSUI], is an appropriate starting point.

Upon expiration of the collective bargaining agreement between a number of San Francisco hotels and the union representing the employees, the union took strike action against some but not all of the hotels. During the ensuing period, the union obtained employment for some of the striking employees in other hotels and restaurants that were unaffected by the strike.

Before the termination of the strike, some of these individuals again became unemployed. They applied for unemployment compensation, contending that although they left their original employment voluntarily their subsequent employment and unemployment eliminated the causal effect of the original trade dispute.

The court there stated that if a trade dispute is the direct cause of the continuing unemployment, the claimant who voluntarily left his employment continues to be ineligible for benefits. The strike suspends the employer-employee relationship but does not terminate it.

Thus, it was held that if a striking employee obtains subsequent employment, the question of whether his ineligibility continues or is terminated depends on whether there is *a complete severance of the relationship with his former employer*.

In *Ruberoid Co.* v. *California Unemployment Ins. Appeals Board*, 59 Cal.2d 73 [LD-445.2-29, BSSUI], the court addressed the problem of the point at which the striking employees' ineligibility terminates because of retaliatory conduct on the part of the employer. There, the union admittedly "struck the first blow" by calling a strike. Thus, there was an initial ineligibility flowing from that action.

When the employer notified the employees that they had been discharged and permanently replaced by other personnel, the original labor dispute was held to be at an end. The *Ruberoid* court held that ineligibility no longer existed because the continuing unemployment was not "caused" by the now-terminated labor dispute.

This was a logical extension of the "severance-of-relationship" test described in *Mark Hopkins, Inc.* v. *Cal. Emp. Com., supra,* 24 Cal.2d 744.

The key feature in *Ruberoid* was the permanent replacement of the striking employees. This view is based on the following language in that case, at page 82: "The employer here did not merely discharge the striking employees; it permanently replaced them and disrupted any relationship with them. . . ." and is reinforced by the language and result in the later case of *Isobe* v. *Unemployment Ins. Appeals Bd.*, 12 Cal.3d 584.

In *Isobe,* after the employees struck, the union made an offer to return to work on condition that all employees be rehired. The employer, desiring to retain certain employees hired during the strike, refused to rehire *all* employees without specifying which ones or how many it would rehire. The court held that the continued unemployment of the striking employees was "caused" by the trade dispute and the ineligibility under Unemployment Insurance Code, section 1262, continued.

The rule in determining eligibility under section 1262 as synthesized from the cases is cast in the form of two questions: (1) did the employee voluntarily leave his employment as part of a trade dispute? and (2) in his continued unemployment the direct result of the continuance of the trade dispute? Determining the issue of whether the dispute continues to operate as the cause of the unemployment requires a further determination of whether the employee, as in *Mark Hopkins, Inc.* v. *Cal. Emp. Co., supra,* 24 Cal.2d 744, or the employer, as in *Ruberoid* v. *California Unemployment Ins. Appeals Board, supra,* 59 Cal.2d 73, effectively severed the employer-employee relationship.

It is in this latter determination that the board and the trial court in our case erred. Instead of focusing on the question of continuation of the employer-employee relationship, the board and the trial court adopted a rule that focused on the reasonableness and foreseeability of NBC's demand as a condition of permitting the strikers to return to work. This in effect involved the board and the trial court in evaluation of the merits of NBC's position — an evaluation that is not at issue in these proceedings and not in keeping with the neutral position of the State.

For example, in its brief here, the board argues that it was unreasonable for NBC to insist on assurances that sabotage be prevented because no sabotage had occurred in California. It also contends that it was unreasonable for NBC to insist on assurances of future strike notice because NABET had previously given advance strike notice.

Based on its perception that these demands were unreasonable, the board concluded that they were unforeseeable consequences of the orignal strike action.

We reject these arguments as specious. The fact that the sabotage did not occur in California is beside the point. NBC was negotiating with a single union on a nationwide basis. Its demand for assurance that sabotage would not be repeated need not have been confined to the geographic area where it had already occurred. Further, the fact that NABET had previously given advance notice of a strike did not require NBC to assume that such would always be the case in the future.

Beyond that, foreseeability is not the test. The board's argument is apparently based on its misinterpretation of language to be found in *Gardner* v. *State of California, supra,* 53 Cal.2d 23. There, the court, in describing the "volition-causation" rule stated,

> As applied in the subject and cited cases, the rule works impartially as to both employees and employers and puts each group on notice that the one which creates and first applies the economic weapon in a trade dispute . . . may have to bear responsibility for *foreseeable* reprisals. (Emphasis added.)

As pointed out earlier, *Gardner* involved the issue of whether locked-out employees were viewed as having left their employment voluntarily because the union representing them, although having declared an industry-wide strike, actually ordered walkouts only at selected establishments. *Gardner* did not deal with the "continuation-causation" aspect of the problem.

The thrust of the case law is simply that when a union orders a strike it must anticipate that the employer will resort to some countermeasures. The collective bargaining process envisions demands and proposals by both employers and employee representatives.

It is clearly foreseeable that when employees elect to strike they will be unemployed for a period of time, and that the employers will not automatically yield to every demand but will, instead, counter with their own demands for concessions.

To carry the board's position here to its logical extreme would result in the board injecting itself into the trade dispute as a judge of the merits of the positions of the protagonists. In a prolonged strike where the strikers applied for unemployment compensation benefits, the board would determine the issue of whether the trade dispute was the cause of the continuing unemployment by deciding on the one hand the reasonableness, and hence the foreseeability, of the employer's demands or, on the other hand, the reasonableness of the union's demands and the foreseeability of the employer's refusal to meet them. This is directly contrary to the spirit and purpose of Unemployment Insurance Code, section 1262.

Coming now to the case before us, we find that there is no real factual dispute. Thus, we are not circumscribed in our review of the lower court's decision by any findings of fact. Our task instead is to determine as a matter of law whether, under the undisputed facts, the striking employees were eligible for unemployment benefits. (*Shoban* v.*Board of Trustees,* 276 Cal.App.2d 534; *Mark Hopkins, Inc.* v. *Cal. Emp. Com., supra,* 24 Cal.2d 744.)

NABET "struck the first blow" by ordering a strike of its members against NBC. The effort was nationwide and involved NBC employees at all of the latter's facilities. As of March 31, 1976, the striking employees were ineligible for unemployment benefits by viture of Unemployment Insurance Code, section 1262.

The sole question presented is whether NABET's offer to return to work on April 7, 1976, and NBC's conditional refusal effectively broke the causal connection between the trade dispute and the continued unemployment of the strikers.

It seems evident that the trade dispute was continuing and in active progress at NBC's facilities. The focus of that dispute was the nonexistence of a collective bargaining agreement. NABET struck at the expiration of the previous agreement. In so doing, it took the position that its members would not continue to work in the absence of agreement. NBC's posture in refusing to permit the return to work was identical to that of NABET's previous position, i.e., "no agreement — no work."

In a collective bargaining agreement, advantages flow to both sides. From the employer's standpoint, the major benefit is stability in its work force and a certain foreseeability of freedom from labor strife and disruption. We see nothing unreasonable in employer's adopting a position comparable to the union's position in regard to the desirability of a contract. NBC did not permanently replace the striking employees. Instead it indicated a willingness to rehire on certain conditions. It continued to negotiate with NABET on a new agreement.

For its part, NABET clearly intended that its members would at some time return to their jobs, and, of course, they eventually did after executing a new agreement.

Thus it is clear that neither the employee nor the employer permanently severed the previous relationship. The employer-employee relationship and the trade dispute between them continued during the period March 31, 1976, to May 22, 1976. So then did the employee ineligibility under Unemployment Insurance Code, section 1262 continue.

The judgment is reversed. The matter is remanded to the trial court with directions to enter a judgment granting NBC's petition for writ of mandate as prayed.

COMPTON
ROTH
BEACH

Maine A

[Affirmed, December 3, 1979, Maine Employment Security Commission, decision No. 79-C-6461, unpublished.]

Decision of Appeal Tribunal No. 79-A-5352
October 26, 1979

Claim and registration

Miscellaneous 75

Claimant did not report as scheduled by his local office to file a weekly claim because he had driven his 75-year old mother to Canada in connection with a legal matter; town officials had required her presence there to avoid possible legal complications. He left early one day and returned after 5 p.m. the next. *Held,* failure to file claim on the assigned report day was for good cause because his absence was for a reason beyond his control and of a compelling nature.

Findings of Fact

The deputy's decision in this case denied benefits to the claimant from September 9, 1979, to September 15, 1979, on the grounds that the claim was not filed in accordance with section 1192-1 of the Employment Security Law, and Rules Governing the Administration of the Employment Security Law pertaining thereto.

The claimant did not report to file his claim on September 18, 1979, as scheduled, for the week ending September 15, 1979, because he was out of town on a personal emergency.

The claimant had to drive his 75-year-old mother to Canada, where she was ordered to appear before town officials in regard to possible legal action. He left early September 17, 1979, and returned after 5:00 p.m. September 18, 1979. It was imperative that the claimant's mother appear in person on this specific date to avoid possible legal complications.

Reasons for Decision

Rules Governing the Administration of the Employment Security Law, chapter 3.1 (L)(2) provides, in part, that if a claimant has good cause for his failure to make his claim on his assigned report day and files such claim within 7 days of such assigned report day, benefits will be allowed if otherwise qualified.

Good cause is generally considered to exist if there was an emergency or other compelling situation.

In view of the above and from the testimony taken at the hearing, it is in evidence the claimant had no choice and went to Canada because of an emergency.

Therefore, it is determined by this tribunal that the claimant did show good cause for not filing his claim on his assigned report day, within the meaning of section 1192-3 and Rule 3.1, L,2 of the Maine Employment Security Law.

Decision

The decision of the deputy is hereby *set aside*. The claimant shall be allowed benefits from September 9, 1979, to September 15, 1979, if otherwise qualified.

APPEAL TRIBUNAL

GEORGE O. CLOUTIER

Prepared by Employment and Training Administration

READEX FICHE

Wisconsin

[Affirmed, November 9, 1979, Wisconsin Labor and Industry Review Commission, decision No. 79-02051 AJ, unpublished.]

Decision of Examiner
August 9, 1979

No. 79-02051 AJ

Connecton with work

Miscellaneous 5
Misconduct 85, 190.1
Voluntary leaving 135.4

An elementary school teacher, employed 5 years to June 1979 by a Catholic parochial school, was not rehired for the ensuing academic year because of her conduct in March. At that time, she and her fiancee, both divorced and without benefit of annulments of their prior marriages through the Church, announced their marriage. Her remarriage in June under State law by a minister of another Christian denomination was not recognized because it had taken place "outside the Church." Her contract provided for discharge for cause, including "conduct not in keeping with Christian principles which may give rise to scandal in the community." Accordingly, she was terminated for misconduct connected with her work. *Held,* eligibility established because the remarriage was not relevant to her employment. Evidence was lacking of conduct adverse to Christian principles or which would engender scandal in the community. The ceremony, performed by a Christian minister in a Christian church was not intrinsically "un-Christian" or "scandalous." Contractual provisions forbidding certain conduct but void because they are contrary to public policy because they inhibit marriage (as is the case here) are not per se employment related. (Note: See Report 325, June 1979, VL-135.4-55, for contrary view.)

Finding of Fact and Conclusions of Law

The employee worked during 5 academic years as an elementary school teacher for the employer, a Catholic parochial school. Her last day of work was June 7, 1979 (week 23), when the 1978-79 school year ended. Thereafter, she was not offered a contract for further employment by the employer. For unemployment compensation purposes, such failure to offer her a contract for continuing employment must be considered to be a discharge.

In March 1979, the employee, who had been previously married and divorced under civil law, informed her employer that she intended to be remarried to another previously divorced person. She indicated to her employer that she and her intended husband did not intend to seek annulments of their prior marriages through the Catholic church. In June 1979, she was remarried in a marriage ceremony under State law, conducted by a minister of another Christian denomination. Such remarriage was considered to be a marriage "outside the Church" and was not recognized by the Catholic Church.

The contract under which the employee was employed provided that she might be discharged for cause, including "conduct not in keeping with the Christian principles which may give rise to scandal in the community." The employee was discharged (or nonrenewed) under this contract provision. The employer contended that she had violated the contract provision and that her discharge was for misconduct connected with her employment. For reasons which will be explained, that contention cannot be sustained.

First, the employer failed to demonstrate that her actions were not in keeping with Christian principles or that they would cause scandal in the community. Her remarriage ceremony was conducted by a Christian minister in a Christian church, and while it may not be recognized by the Catholic Church, it is not inherently an "un-Christian" or "scandalous" action.

Second, the employer failed to demonstrate that her actions as described above were connected with her employment or that her remarriage would adversely affect her suitability for employment. The fact that the employer, by establishing a very broad contract provision, had indicated its disapproval of certain types of conduct does not in and of itself establish that the conduct is employment related.

Third, past unemployment compensation cases have held that contracts or contract provisions which tend to inhibit marriage are void as being contrary to public policy. The contract provision here in question, if it is to read as prohibiting remarriage, or marriage outside the Catholic Church, tends to inhibit marriage. Violations of such provisions, it has been held, are not to be penalized by the denial or unemployment benefits, nor are the contracts to be indirectly approved by such means. See, for example, case No. 59-C-459, cited in the 1979 Wisconsin Unemployment Compensation Digest at section MC 615.

For all the reasons above, it must be held that the employee's actions in entering into a remarriage ceremony outside the Catholic Church were not equivalent to misconduct connected with her employment and cannot be penalized by the denial of unemployment benefits.

The appeal tribunal therefore finds that in week 23 of 1979, the employee was discharged, but not for misconduct connected with her employment within the meaning of section 108.04(5) of the statutes.

Decision

The department deputy's initial determination is *affirmed*. Accordingly, the employee is eligible for benefits based on employment with the employer, if she is otherwise qualified.

APPEAL TRIBUNAL
KAREN L. GODSHALL
Examiner

Wisconsin

CIRCUIT COURT
DANE COUNTY

November 5, 1979

MILLER BREWING CO. *v.* DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS AND RICHARD SIMMONS

Dishonesty:
Falsification of record

Miscellaneous 95.25, 139
Misconduct 140.25

A brewery worker and forklift operator, employed more than 2 years, was discharged for falsification of application for employment. Investigation of public records, made after an alleged threat on the life of his foreman, disclosed the employee's convictions for wife and child abandonment, nonsupport, and disorderly conduct while intoxicated. Claimant also then volunteered that he had received a dishonorable military discharge. He falsified the application to assure employment; on two prior occasions, he had not been hired because he had been truthful. Several months after termination the statute was amended, making it discriminatory for an employer to consider a prior conviction record unless it was material to the job. *Held,* employee discharged for misconduct connected with work because good faith in the employment relationship requires honesty in applications; prior convictions and an adverse military record are relevant to an employee's conduct with coworkers and supervisors. The subsequent amendment, effectively eliminating admission of a prior conviction record unless material to the job, could not be applied retroactively because the employer was entitled to have the law in effect at the time of separation enforced. An employee, subject to his actual or implied understanding, determines what is material in an application — no misunderstanding on claimant's part existed.

This is an action by the plaintiff employer for review of a decision of the Labor and Industry Review Commission (hereafter the commission) dated March 3, 1978, entered in an unemployment compensation proceeding that reversed the decision of the appeal tribunal and determined that the defendant employee Simmons was eligible for unemployment compensation benefits if otherwise eligible. The issue before the appeal tribunal and the commission was whether the employee had been discharged by the employer for misconduct connected with his employment within the meaning of section 108.04(5), Stats.; he had falsely answered questions in the signed application for employment form he had furnished to the employer prior to being hired.

Synopsis of Proceedings Before the Appeal Tribunal and the Commission

The examiner, sitting as the appeal tribunal, found among other things that the employee, "might not have been hired" by the employer had he furnished the complete and correct information requested of him on the application form. It was also found that the employee did not truthfully answer the questions relating to military service and criminal convictions because he believed that by doing so he would not be hired. The examiner concluded that the employer's requirement of a truthful and complete report was reasonable, and that the employee's deception in not doing so was a direct violation of his obligations to the employer and amounted to a willful and substantial disregard of the employer's interests. The examiner concluded therefore that the employee was discharged for misconduct connected with his employment within the meaning of section 108.04(5), Stats.

The commission's findings of fact and conclusions of law on review read:

> The employee, aged 42, worked for 2 years and 3 months as a brewery worker and forklift driver for the employer, a brewery. His last day of work was June 6, 1977 (week 24). He was discharged on June 7, 1977 (week 24).
>
> On May 17, 1977 (week 21), the employer's security chief received information that the employee allegedly had threaten [sic] the life of a supervisor. The security chief thereupon consulted the public records and discovered that he had been convicted of wife and child abandonment and nonsupport in 1970, and that he had been convicted of disorderly conduct while introxicated in 1965. He was thereafter discharged because a check of his employment application revealed that he had answered negatively to the question of whether he had even been convicted of a crime other than traffic violations and because he further admitted to having received an undesirable discharge from military service in 1956, although this had not been stated on his employment application. The employer contends that his falsification of his employment application constituted misconduct connected with his employment.
>
> The employee admitted that he failed to accurately report his military record and prior convictions on his January, 1975 employment application, but explained that he did so only because he had accurately reported his prior convictions and previous military record in 1973 and again in 1974, when he sought employment with the employer, but was not hired.
>
> The employer asserted that an applicant's prior conviction record was relative to the suitability of the applicant for employment and that its rule requiring discipline up to discharge for falsifying records was because workers are required to fill in many records themselves during the course of employment. While the employer does have a legitimate right to require accurate record reporting, the mere request for information regarding prior conviction records on an employment application tends to induce false or incomplete answers to avoid nonconsideration for hire. There was no evidence of record that the employee had misrepresented any other records or reports during his 2-plus years of service. Further, he did not make a threat on the foreman's life. Furthermore, the employee's prior convictions and military record, when considered in terms of the time of occurrence, nature and number, show little relevance for purposes of determining his suitability as a forklife driver and brewery worker. Moreover, the employer admitted that he would not have been considered for hire had he reported his true military record and conviction record.
>
> Under all the circumstances, the employee's actions in failing to accurately report his prior military and conviction record may have appeared unsatisfactory to the employer, but did not evince such a willful, intentional or substantial disregard for the employer's interests so as to constitute misconduct connected with is employment for the purpose of determining benefit eligibility.
>
> The commission therefore finds that in week 24 of 1977, the employee was discharged by the employer, but not for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes.

In a note attached to its decision, the commission explained its reasons for the reversal of the appeal tribunal as follows:

> NOTE: In reversing the appeal tribunal decision the commission considers that the employee's actions, although contrary to the employer's expectations, did not constitute misconduct connected with his employment, considering the reasons for his actions, the nature and time of the occurrences of his prior conviction record, and his length of service with the employer without serious incident.

The Issues

The principal issue to be resolved is whether the commission's conclusion of law that the employee was not discharged for misconduct connected with his employment within the meaning of section 108.04(5), Stats., is erroneous as a matter of law. These additional subsidiary issues have been raised by the parties:

(1) Whether the commission had the right to take into consideration the provisions of sections 111.31(1) and 111.32(5), Stats., as amended, subsequent to the employee's discharge in passing on the misconduct issue. (2) Whether the falsification by the employee in his application form went to "*material*" facts within the meaning of the certification constituting the concluding paragraphs of the application.

Supplemental Facts

This statement of facts supplements those stated in the commission's findings.

The question in the employee's job application (exhibit 2) relating to conviction for crime read:

Have you ever been convicted of a crime other than traffic violations? Yes ____ No ____
If yes, complete this section
Date convicted ________________ Charge(s) ________________ Place ________________
Disposition of case following conviction.

The employee placed an "X" in the "no" square and filled in none of the blanks. There also were blanks under the heading of "U.S. MILITARY RECORD" to be filled in with respect to dates of service, duties, branch, rank at discharge, and type of discharge. The employee filled in no information in any of the blanks, thus indicating he had no military service record.

The last paragraph of this job application the employee signed read:

> I certify that the foregoing answers are true and correct to the best of my knowledge and belief and understand that any misstatement or omission as to a material fact would constitute grounds for an immediate dismissal or rejection of my application. (exhibit 2)

In addition to the two criminal convictions mentioned in the commission's findings, which the employer's security chief discovered by his search of the public records, was a third conviction in 1967, this for failure to support his wife and child (exhibit 5) for which the employee was sentenced to 90 days in the House of Correction. The disorderly conduct for which he was convicted in 1965 involved fighting with police officers.

The employee, after being confronted with his criminal record by Olson, the employer's industrial relations representative, on June 6, 1977, admitted such convictions and also volunteered information with respect to his military service record and that he had received a dishonorable discharge. He also stated to Olson that he had been court martialed on three occasions, two of which were for AWOL. The employee testified he had served in the Air Force for 3 years and 4 months from 1953 until 1956, having been 18 years old when he entered service.

Olson testified that in this conference with the employee on June 6, 1977, he discharged the employee effective June 7, 1977, and gave him as the reason, "falsification of employment application" (Tr. 6). The written discharge given to employee (exhibit 1) was signed by Vander Linden, his supervisor, which also stated the same reason for discharge.

Further facts will hereinafter be stated in connection with the court's consideration of the issues.

The Applicable Statute

Section 108.04(5), Stats., provides:

> DISCHARGE FOR MISCONDUCT. An employee's eligibility for benefits, based on those credit weeks then accrued with respect to an employing unit, shall be barred for any week of unemployment completed after he has been discharged by the employing unit for misconduct

connected with his employment; provided, moreover, that such employee shall be deemed ineligible for benefits (from other previous employer accounts) for the week in which such discharge occurred and for the 3 next following weeks.

The Court's Decision

A. *Whether Commission Had the Right to take into Consideration Amendments to Fair Employment Act Statutes Made Subsequent to Discharge.*

The employee was discharged effective June 7, 1977. Thereafter, the legislature by ch. 125, Laws of 1977, effective November 1, 1977, amended sections 111.31(1) and 111.32(5)(a), Stats. and created sections 111.32 (5)(h), Stats.

As so amended, section 111.31(1) now reads:

> The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reasons of their age, race, creed, color, handicap, sex, national origin, ancestry, *arrest record or conviction record* is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers, licensing agencies, and labor unions of employment opportunities to such persons solely because of their age, race, creed, color, handicap, sex, national origin, ancestry, *arrest record or conviction record,* and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them. (Italics indicate additions made by amendment.)

As so amended, section 111.32(5)(a) now reads:

> "Discrimination" means discrimination because of age, race, color, handicap, sex, creed, national origin, ancestry, *arrest record or conviction record* by an employer or licensing agency individually or in concert with others, against any employee or any applicant for employment or licensing in regard to hire, tenure or term; condition or provilege of employment, or licensing; and by any labor organization against any member or applicant for membership, and also includes discrimination on any of said grounds in the fields of housing, recreation, education, health, and social welfare as related to a condition or privilege of employment." (Italics indicate addition made by amendment.)

Newly created section 111.32(5)(h) reads in pertinent part:

> . . . The term "conviction record" includes, but is not limited to, information indicating that a person has been convicted of any felony, misdemeanor or other offense; placed on probation, fined, imprisoned, or paroled puruant to any law enforcement or military authority. It is discrimination because of arrest record or conviction record:
>
> . . .
>
> 2. For any employer . . . to refuse to hire, employ, admit, or license any person, or to bar or terminate any person from employment, membership, or licensing; or to discriminate against any person in promotion, compensation, terms, conditions or privileges of employment, membership or licensing; or otherwise to discriminate against any person because such person has an arrest record or a conviction record; provided, however, that it shall not be unlawful;
>
> . . .
>
> b. For an employer . . . to refuse to employee . . . or to bar or terminate from employment . . . any person who has been convicted of any felony, misdemeanor. or other offense the circumstances of which substantially relate to the circumstances of the particular job . . .

The brief of defendant Department of Industry, Labor and Human Relations (DILHR), in contending the falsification by the employee of his job application, did not go to material facts, gives consideration to those amendments to sections 111.31(1) and 111.32(5)(a) and to newly created section 111.32(5)(h). Although DILHR acknowledges that this is not a discrimination case and these statutory changes were not in effect at the time of discharge, it asserts they were "on the books" at the time the commission made its decision and were "entitled to considerable weight in determining what factors ought to be considered in determining materiality." Later in

DILHR's brief it is stated, "Chapter 125, Laws of 1977 (effective November 1, 1977) establishes a clear legislative policy giving protected status to persons with criminal records."

The employer has a substantial right in having the statutory law in effect at time of discharge applied in this case, and not statutory changes made subsequent thereto. While unemployment compensation is not payable directly by an employer, but out of its reserve account administered by DILHR, any depletion of the reserve account beyond a certain point has to be replenished by the employer through increased contributions.

Statutes affecting existing rights or obligations are prospective in operation only and do not apply retrospectively to prior acts. See, *Davison* v. *St. Paul Fire & Marine Ins. Co.*, 75 Wis.2d 190, 200, 248 N.W.2d 433 (1977), and cases cited therein. Therefore, in passing on the materiality of the employee's falsification of his job application, these 1977 statutory changes were not to be taken into consideration by the commission when it rendered its decision, nor are they by this court in reviewing such decision.

B. *Whether the Falsification by the Employee Went to "Material Facts" Within the Meaning of the Certification.*

By the certification constituting the concluding paragraph of the employee's job application quoted above, the employee stated his understanding "that any misstatement or omissions as to a *material fact* would constitute grounds for an immediate dismissal" (emphasis added).

DILHR's brief contends that it is only logical to conclude that misstatements or omissions as to immaterial facts would not lead to discharge, and a job applicant could not be expected to have fair warning of the falsification of an immaterial fact. The brief then asserts that the threshhold question is "Who determines materiality?"

For the purpose of the "fair warning issue" raised by DILHR, the court is of the opinion that the employer is the one who does, subject to the test of whether the employee understood, or should have understood, at the time of signing the application that the employee considered the falsification went to a fact or facts that the employer considered material.

Here the employee clearly understood that the employer considered his past conviction record and dishonorable discharge material because, when he had truthfully answered the question as to conviction and filled in the blanks pertaining to his military record, he was not hired. The employee was asked the question, "Why did you say you falsified your application?", and he answered "To get a job" (Tr. 39). He made no claim that the reason he falsified was because he thought the matters were not material or of no consequence to the employer.

However, a distinction must be drawn between the employer's right under the certification to immediately discharge the employee under the certification paragraph of the job application where it deserved the falsification, and the question of whether the falsification for which the discharge was made constituted misconduct connected with the employment under section 108.04(5), Stats. If materiality of the facts falsified enters into the latter issue, this is for the commission to determine subject to applicable principles of law.

C. *Whether the Employee Was Discharged for Misconduct Connected with his Employment Within the Meaning of section 108.04(5).*

The long-accepted definition of the term "misconduct connected with his employment" now found in section 108.04(5), Stats., is that set forth in

Boynton Cab Co. v. *Neubeck,* 237 Wis. 249, 259, 296, N.W. 636 (1941) [V4-8,201 BSSUI] as follows:

> The intended meaning of the term "misconduct" as used in Sec. 108.04(4)(a), Stats., is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Later cases have emphasized the test of misconduct under section 108.04(5), Stats., to be an intentional and substantial disregard of the employer's interests or of the employee's duties. *Cheese* v. *Industrial Comm.*, 21 Wis.2d 8, 16–17, 123 N.W. 2d 553 [MC-300.15-33, BSSUI], and *Tate* v. *Industrial Comm.*, 23 Wis.2d 1, 5, 126 N.W. 2d 513 [VL-135.1-91, BSSUI].

There are no Wisconsin Supreme Court cases dealing with whether falsification of answers with respect to questions inquiring as to the past criminal record of the applicant constitutes misconduct connected with the employment within the meaning of section 108.04(5), but there are two circuit court decisions. These are *Disch* v. *Miller Brewing Co.*, CCH Unemployment Insurance Reports, Par. 1970.25 (Dane County Circuit Court, 1958), and *Novak* v. *Coca Cola Bottling Co. of Wisconsin,* CCH Unemployment Insurance Reports, Par. 8775 (Dane County Circuit Court, 1976).

In *Disch,* the claimant filled out an application for employment on which he misrepresented his criminal convictions involving the operation of an automobile while intoxicated and disorderly conduct. The application stated that any misrepresentation would constitute cause for immediate discharge. The employer did not have any knowledge of the misrepresentation until after the claimant had been in its employ for 16 months, at which time claimant was terminated. In upholding a decision of the Industrial Commission that the claimant was discharged for misconduct, the court noted:

> It does not strike us that there can be any serious question but that honesty in the submission of employment applications is a matter of utmost concern in employment relations. If an employer is entitled to have a given question answered in such an application, he is entitled to have it answered honestly and is entitled to rely upon the answer. To conclude otherwise would be to destroy good faith in employment relations . . . honesty and fair dealing with the employer are the very foundation of his employment, the commission's finding of misconduct connected with the employment is clearly within the spirit and letter of the legislative enactment, narrowly construed, which was designed to protect the employer against such acts of dishonesty.

It should be noted further that the employer admitted that the employee's conduct while employed was satisfactory, but that it would not have hired him at the outset if his record had been known.

This court in *Novak* held an employee's failure to disclose his criminal record on his employment application as required by the employer constituted a willful and substantial disregard of his employer's interests and constituted sufficient grounds for a misconduct discharge. Citing *Disch,* among other cases, the court noted:

> The warning given on the application that a misrepresentation would be cause for discharge made clear to the employee how serious the employer considered a misrepresentation to be, and it was reasonable for the department to conclude that the employee's false answer with respect to his criminal action evinced a willful and substantial disregard of the employer's interests.

> *The fact that the employee's intent was primarily to secure the job applied for does not relieve him from the responsibility of knowingly disregarding the employer's interests by falsifying an answer to a question he knew the employer regarded as important.* (Emphasis added)

The court further noted in response to an argument that a subsequent period of satisfactory employment would serve to purge a misrepresentation on the application materials:

> Whether an employee's conduct in falsifying an answer in an employment application constituted misconduct under Sec. 108.04(5), Stats., must be determined on the basis of what occurred at the time of the falsification and not by what hereafter occurs.

Accordingly, the commission's finding of misconduct and a denial of benefits was affirmed.

The court considers the principal reason why the commission chose not to follow the precedents of the *Disch* and *Noval* cases is to be found in this statement, made in its findings of fact and conclusions of law:

> Furthermore, the employee's prior convictions and military record, when considered in terms of the time of occurrence, nature and number, show little relevance for purposes of determining his suitability as a forklift driver and brewery worker.

It is a matter of common knowledge that many employers consider that bad conduct tendencies evidenced by dishonorable discharges from military service and prior criminal convictions may carry over when the individual is employed. In consequence of this, they insert questions in their job classification forms asking about such matters so they may determine from the answers, sometimes supplemented by further investigations, whether they consider the applicant to be a desirable employee. Such employers have an interest in having such questions truthfully answered. One of the employee's criminal convictions, that for disorderly conduct, was for fighting with police officers and might well have been considered by the employer in this case as being material with respect to the employee's conduct toward his supervisors and fellow employees with whom he would have had to work.

The bad military record resulting in dishonorable discharge, which occurred 19 years prior to his filling out the job application, standing alone, might well have little materiality with respect to the employee's job performance. This is also true of the abandonment and nonsupport convictions standing alone. However, the cumulative effect of omitting to state these matters, combined with the omission to state disorderly conduct conviction in the application, deprived the employer of information the employer could reasonably consider it had a right to know in deciding whether it considered the applicant would make a suitable employee.

The court is at a loss to perceive the materiality of this statement inserted in the commission's findings:

> . . . the mere request for prior conviction records on an application tends to induce false or incomplete answers to avoid nonconsideration for hire.

There is no testimony to support this finding:

> Further he [the employee] did not make a threat on the foreman's life.

The employee did not deny making a threat at the hearing. The examiner sitting as an appeal tribunal ruled that evidence having to do with misconduct other than the falsification of the job application was irrelevant because the sole reason given by the employer for the discharge was such falsification. Therefore, the employer made no attempt to prove such threat had been made other than its security officer stating that the reporting of such threat to him by the foreman was the reason he checked the public records showing the employee's criminal convictions.

DILHR's brief quotes this court's concluding paragraphs in the *Novak* case, which stated:

> On oral argument plantiff's counsel argued that public policy favors the rehabilitation of persons convicted of crime by affording them employment, and therefore, employers should not be permitted to discharge an employee who has falsified a question in his employment application which inquires whether he has been convicted of crime. This is analogous to contending that an employer may not discriminate in its employment practices against persons convicted of crime. However desirable such a policy may be, it is a policy decision the legislature should make in the same manner it has done with respect to discrimination in employment practices because of race, sex, and age. Up to now the legislature has not so legislated.

After so quoting this extract, DILHR's brief states, "The legislature has now so legislated," and cited chapter 125, Laws of 1977. However, as previously determined herein, this legislation was not retrospective to the time of the employee's discharge. What is significant with respect to the quoted statement from the *Novak* case decision is the clear implication that only the legislature, not the commission, has the power to change the rule of the *Disch* and *Novak* cases — that an employer has an interest in questions inquiring as to past criminal convictions being truthfully answered by the applicant.

The court has found this case a hard one to decide because it is in accord with the humane objective achieved by the amendments made to the Fair Employment Act statutes by chapter 125, Laws of 1977. The court, however, has reached the conclusion that, as a matter of law under the holdings of the *Disch* and *Novak* cases, the employee intentionally and substantially disregarded the interests of the employer when he falsified his answer to the conviction of a crime question in his job application, and therefore was discharged for misconduct connected with his employment within the meaning of section 108.04(5), Stats.

Let judgment be entered reversing the commission's decision, which is the subject of this review and remanding the matter to the commission for further proceedings. Such further proceedings shall be limited to the issues of the liability of employee to repay the amount of benefits previously paid him, and the restoration to the employer's reserve account of such amounts.

BY THE COURT:

GEORGE R. CURRIE
Reserve Circuit Judge

best copy available

Florida B

Decision of Commission
November 15, 1979

No. 79-2257

Evidence:
Weight and sufficiency

Misconduct 140.25, 190.15, 485.05

A beauty school instructor, believed by employer to have stolen articles from the school, to have violated a rule prohibiting outside personal contact between instructors and students, and to have falsified her application for employment, was determined to have been discharged for misconduct connected with work inasmuch as her conduct, thus, reflected deliberate violation or disregard of the standards of behavior reasonably expected by employer of an employee. ***Held,*** reversed, because there was legally insufficient evidence to support such conclusions; the evidence present was not reasonably specific, competent or substantial. No evidence was submitted of stealing or that employer had pressed charges. No evidence was submitted of falsification of an employment application, the document actually being an application for "enrollment as a student." The relevant factor involving conviction of a crime was an accusation based on an unsubstantiated telephone call to the Sheriff's Department, which would be insufficient to establish a criminal record, formal charge, conviction of a crime, or falsification of the application. No direct evidence was submitted of a rule violation. Thus, the allegations were inadmissible hearsay and, therefore, insufficient to support a conclusion of misconduct, which requires evidence to be competent and substantial.

Findings of Fact and Reasoning

This cause comes before the commission for disposition of the claimant's application for review pursuant to section 443.07(4)(c), Florida Statutes, of a decision by the appeals referee wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

The claimant worked as an instructor for the employer, a beauty school. The employer believed that the claimant had stolen items from the school. The employer also believed that the claimant had violated a work rule which prohibited outside personal contact between instructors and students. On or about the beginning of April 1979, the employer called the Jacksonville Sheriff's Department. From this contact, she believed that the claimant had filled out her application for employment untruthfully. The claimant was discharged on April 5, 1979.

The issue before the commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in section 443.06(1), Florida Statutes.

The appeals referee reversed the determination of the claims examiner and held that the claimant was disqualified for receipt of benefits for having been discharged for misconduct connected with work, reasoning that the claimant's conduct constituted a deliberate violation or disregard of the standards of behavior which the employer expected of her. There is legally insufficient evidence in the record to support this conclusion.

In order to find that a claimant was discharged for misconduct connected with her work, there must be competent, substantial evidence establishing that the claimant was guilty of an intentional act, omission, or course of conduct in violation of the employee's duties and responsibilities, tantamount to a deliberate disregard of the employer's interest, or negligence of such a degree or recurrence as to evince equal culpability. Evidence sufficient to support such a finding must be reasonably specific.

READEX FICHE

There was no evidence that the claimant had stolen things from the employer's beauty shop, nor had the employer ever pressed charges against the claimant. There was no evidence that the claimant lied on her "application for employment." To support this allegation, the employer introduced a copy of the claimant's "application to enrollment as a student." This is not an "application for employment." The statement in question on the application is whether or not the claimant had ever been convicted of a crime. The employer's unsubstantiated telephone call to the Jacksonville Sheriff's Department is not sufficient to establish that the claimant had a criminal record, had been charged in any formal action, had been convicted of a crime, or even that she had lied on her application.

The employer submitted no direct evidence that the claimant had been guilty of an infraction of the rule prohibiting personal contacts between the students and the instructors. The employer's only direct evidence concerning the claimant involved the fact that the employer did not believe that the claimant met the proficiency standards the beauty school expected of all instructors.

Florida Administrative Code Rule 8B-5.11(3)(c) provides that hearsay evidence alone will not constitute competent, substantial evidence sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The employer's evidence concerning the alleged thefts, the claimant's alleged untruthfulness in her application for employment, and any possible infractions of the school rules, are all clearly inadmissible hearsay and insufficient to support a finding of misconduct. The evidence concerning the claimant's shortcomings as an instructor are not of a serious nature. Thus there is legally insufficient evidence in the record upon which to base a disqualification.

The decision of the appeals referee is *reversed*. If otherwise eligible, the claimant is entitled to benefits. The employer's record shall be charged with its proportionate share of benefits paid in connection with this claim.

UNEMPLOYMENT APPEALS
COMMISSION

R. CARSON DYAL, *Chairman*
CHARLIE HARRIS, *Member*

Florida B

Decision of Commission No. 79–2761
November 14, 1979

Evidence

Procedure 190

Claimant's disqualification for voluntarily leaving employment without good cause attributable to employer, imposed by the claim's examiner and affirmed by the appeals referee, was affirmed by the commission. The commission, however, did not also adopt the "burden of proof" standard used by the referee, i.e., that claimant must prove entitlement to benefits by "clear and convincing evidence." It *held,* instead, that the rule only required claimant to show good cause attributable to employer for voluntarily leaving employment by a "*preponderance of the evidence,*" which claimant had failed to do.

Findings of Fact and Reasoning

This cause comes before the comission for disposition of the claimant's application for review pursuant to section 443.07(4)(c), Florida Statutes, of a decision by the appeals referee wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

Upon review, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, *affirmed.*

In affirming the referee's decision, the commission does not adopt the burden of proof standard applied by the referee. The claimant is not required to prove her entitlement to unemployment compensation benefits by clear and convincing evidence. When a claimant voluntarily leaves employment, the burden rests on the claimant to show, by a preponderance of the evidence, that she had good cause attributable to the employer for leaving her employment. The claimant in the instant case failed to meet her burden of proof.

UNEMPLOYMENT APPEALS
COMMISSION

R. CARSON DYAL, *Chairman*
CHARLIE HARRIS, *Member*

READEX FICHE

Indiana

COURT OF APPEALS
FOURTH DISTRICT

December 17, 1979

JOHN A. ADDISON *v.* REVIEW BOARD AND CLARK OIL CO., CLERMONT BRANCH

Fair hearing and due process

Procedure 195, 380.15, 380.3

A service station manager, apparently reluctantly, accepted demotion to assistant manager following a reorganization. He thereafter called in sick and was uncertain when he would return; he was contacted after the estimated time given. The ensuing conversation led to discharge, and his and employer's versions thereof are dissimilar. The hearing referee found his absence was for good cause, illness, but that he had failed to protect his job by not disclosing whether he would *ever* return. The review board adopted the decision in toto. Two hearing officers were involved in the hearing, each, individually and separately, hearing the litigants. The findings and conclusion denying claimant benefits, however, were issued by only one. The statute implies that the same referee who had the hearing would render the adjudication. Claimant appealed because the adjudicator had not heard all the evidence. *Held,* reversed and remanded for new hearing because, in the final analysis, a *meaningful* credibility evaluation, which was necessary, was absent, thus depriving claimant of due process of law. Effectively, the review board is not the ultimate trier of fact when its ruling relies on a referee's deficient credibility evaluation. The adjudicator heard only half of the evidence evaluated; due process requires all of the evidence to be heard.

CHIPMEN, J.:

Claimant John A. Addison appeals from the decision of the review board of the Indiana Employment Security Division (review board) which found his discharge by the Clark Oil Company (employer) was for just cause.

We vacate the decision of the review board and remand the case for a new hearing.

Addison presents the following issues for our consideration:

1. Whether he was afforded procedural due process at the agency level;
2. Whether there was sufficient evidence to support the finding that Addison was discharged for just cause; and
3. Whether the review board acted in a manner contrary to law by affirming the hearing referee's decision. Because of our resolution of the first issue, we find it unnecessary to address the latter two.

Addison was employed by the Clark Oil Company to manage a service station located in Anderson, Ind. On Thursday, May 18, 1978, the employer's representative, Farron Brown, advised Addison that because of a business reorganization, it was necessary for Addison to be demoted from manager to assistant manager of the station. Addison accepted the new position, although there were apparently some hard feelings surrounding the demotion.

On Monday of the following week, Addison called in sick, stating he was suffering from a bad cold and was not certain when he would return to work, although he estimated it would be Thursday or Friday. Appellant did not report to work the following Tuesday or Wednesday. On Wednesday afternoon, Farron Brown telephoned Addison to find out when he would return to the job. It was this phone call which precipitated Addison's discharge. According to Addison's version of the conversation, he told Brown he was still suffering from a bad cold, but thought he could return on Thursday or Friday of that week. In response, Brown allegedly stated he had to have someone right away and would not "put up with that stuff." According to Brown's version of the conversation, Addison stated, "I don't know whether I'm ever going to come back to work," and "I don't know what I'm going to do and I'm not going to tell you what I'm going to do." Brown flatly denied Addison estimated his return to be on Thursday or Friday.

The hearing referee found Addison's absences were for good cause, i.e., illness, but that Addison failed to protect his employment when he would not indicate to his employer whether he would ever return to work. The review board adopted the referee's findings and conclusions in toto.

Administrative Due Process

Addison claims he was denied a fair hearing at the agency level. IND. CODE 22-4-17-3 provides in part:

> [A] referee, after affording the parties a reasonable opportunity for a fair hearing, shall affirm, modify or reverse the findings of fact and decision of the deputy.

The language of the statute implies that the same referee who provides the parties with a "fair hearing" will be the referee who either affirms, modifies, or reverses the findings of the deputy. However, the record in this case discloses that two hearing officers were involved in the administrative hearing. Addison testified before referee Thomas Atz on July 30, 1978; the hearing was then continued until September 15, 1978, at which time a second referee, Joseph Kivett, heard evidence on behalf of Addison's employer. It was referee Atz who then issued findings of fact and conclusions, denying Addison's claim. On appeal, Addison argues it was improper for referee Atz to render a decision in this matter when he had not heard all the evidence. In short, Addison argues due process requires "the one who decides must hear." We agree and hold the claimant was denied a fair hearing.

One need not search far to discover the significance our legal system has attached to a trier of fact's ability to observe the demeanor of witnesses and thereby evaluate their credibility. Countless times our appellate courts defer to findings of fact made by administrative agencies, judges, or juries, reviewing evidence only in a light most favorable to the decision below. This standard of review is in recognition of the trier of fact's intelligence and understanding, coupled with the opportunity to personally hear the witnesses and observe a witness' conduct in the act of testifying. In legal concept, the appearance and demeanor of a witness is "assumed to be in evidence." Wigmore on Evidence, 3rd ed. 946.

In *Urbanational Developers, Inc.* v. *Shamrock Engineering, Inc.*, (1978) Ind.App., 372 N.E.2d 742, the Third District considered the propriety of a special judge's attempt to make credibility evaluations of witnesses who testimony he had not heard. A successor judge, who did not preside at trial, was appointed to rule on a motion to correct errors pursuant to Ind. Rules of Procedure, Trial Rule 53.1. Holding it was improper for the special judge to weigh evidence and determine the credibility of witnesses when ruling on the motion, Judge Hoffman wrote:

> [T]here remain instances in which the successor judge's failure to preside at trial renders him ill-equipped to perform the functions of the regular trial judge. One of these instances occurs

Washington B

[Affirmed, February 27, 1979, Superior Court for Spokane County, decision No. 232551, unpublished.]

Decision of Commissioner's Delegate No. 25758
June 16, 1978

Taking and perfecting proceedings for review:
Timeliness

Procedure 430.2-

Claimant, whose voluntarily-leaving denial was affirmed because of a 7-day late appeal without good cause, swore good cause existed. His affidavit alleged mental and emotional factors paralleling a "nervous breakdown," during which he "stayed home and did not go outside to see anyone." He suffered, then, shock, inability to sleep, depression, functional disability under stress, fatigue, memory loss, confusion, anxiety, headaches, nervousness, impaired judgment, and dizziness, and, subsisted daily on ice cream and beer. Later, hypoglycemia was diagnosed. He referred to marital and financial problems. A vocational counselor cited mild anxiety due to unemployment. A psychiatrist's diagnosis was inconclusive. One internist named "tension headache" and ulcer. Another cited an "obsessive-compulsive personality." A mental health therapist felt claimant was usually rational, able to cope with daily stress, but sometimes depressed and disoriented. His estranged wife corroborated testimony of his depression, his unfinished-yard labor, and his refusal to talk by phone about "real estate deals." He received two benefit checks, revealing ability to work, and, in an interview, four job contacts. In a collateral appeal, he was deemed available in a relevant 5-month period. He testified to arduous yardwork, mood swings, undue attention to merits of his separation diverting reality from appeal's *timeliness*, and genuine attachment to employment. *Held,* good cause for untimely appeal not present because of competency and evidence of impairment was not sufficiently substantial or sustained. The prior decision as to separation was warranted.

In the case of the petitioner, on the 19th day of May, 1977, a Spokane County Superior Court judge ordered this cause remanded to the commissioner for further proceedings "for the consideration of additional evidence bearing on the competency of petitioner to file his Petition for Review from a decision of the Appeal Tribunal dated April 22, 1976." It was further ordered that the commissioner issue a new decision on this matter after consideration of any new evidence relating to petitioner's competency.

Pursuant to the above, it was remanded by the commissioner's delegate to the appeal tribunal on June 30, 1977. The case was rescheduled twice for hearing, and there was a new legal representative. The petitioner was heard on September 7, 1977. The petitioner requested that his estranged wife give testimony in Oregon, which was accomplished on October 7, 1977. Since then, in the main, the elapsed time was due to an exchange of correspondence between the petitioner's legal representative and the undersigned.

The petitioner received the appeal tribunal decision mailed on April 22, 1976, on April 27, 1976. He filed a petition for review on May 10, 1976, due on May 3, 1976. A commissioner's decision on June 7, 1976, held it untimely without good cause for waiver. The case was appealed to superior court. Petitioner's brief argued for good cause on various grounds. It concluded by averring that another factor contributing to the late filing was that he had serious personal and family problems leading to extreme depression. It appended an affidavit of claimant, together with letters from doctors and counselors.

Evidence

Affidivit of petitioner:

At that time I had severe mental and emotional problems which prevented me from filing a timely petition. When I received the decision I had a nervous breakdown. In fact, during the following 12 days, I stayed home, and did not go outside or see anyone. The back of my head was totally numb. I was in shock and unable to sleep. I ate a gallon of ice cream per day plus a six-pack of beer. My symptoms included severe depression, inability to function under any type of stress, physical or mental, extreme fatigue, loss of memory, confusion, anxiety, headaches, nervousness, impaired judgment, dizziness. It was later discovered I had hypoglycemia, which causes emotional tension and stress. I had marital and financial problems.

Letters from doctors and counselors are to the effect that:

(a) A vocational rehabilitation counselor saw petitioner on May 28, 1976, at which time he showed mild anxiety concerning his then current situation of unemployment. He was referred to a medical doctor at a date undisclosed by the vocational counselor, for psychiatric diagnosis, which proved inconclusive as to the type and degree.

(b) The medical doctor saw petitioner on May 27. Petitioner complained of financial pressures and mentioned depression and numbness. He had symptoms suggestive of a recurrent ulcer. The tentative diagnosis was tension headache and ulcer diathesis.

(c) The doctor stated he first saw petitioner on June 29, 1976, requesting help with a lot of personal problems of work and marriage. The petitioner indicated that about a month previous he had an acute emotional disruption leading to withdrawal for 2 weeks. He was showing improvement but still showed definite signs of moderate anxiety. He was seen again on August 23, 1976, complaining of the same difficulties. He continued to have a lot of anxiety with obsessive thoughts and some compulsive behavior. The primary diagnosis was obsessive-compulsive personality. The doctor had the impression that the description he related to May, 1976 may well have been an acute emotional break. It was reasonable per the doctor that his degree of stress would affect his ability to function.

(d) A later affidavit of September 6, 1977, from the Center Therapist at the Community Mental Health Center, Spokane, stated he had been in contact with petitioner since October, 1976, and had discussed his case with the center's physician. The therapist felt that: he was rational and capable of dealing with day to day stress under most circumstances; due to objective or subjective stress, petitioner occasionally showed severe depression, became delusional and disoriented; there are times when he is unable to effectively deal with day to day functions of life.

His estranged wife testified in Oregon in October 1977 that she had left him before but had returned in late April 1976. She corroborated much of his testimony. She stated that in late April, early May, 1976, he ignored or fought with her; kept mostly to himself; was depressed over expenses and marital problems; worked very hard much of the time in their unfinished yard; refused to talk over the phone concerning some real estate deals, and had her do it.

He claimed and received Unemployment Compensation benefits for the two weeks involved, i.e., those ending May 1 and 8, 1976; (17-18/76). Those claim forms include the questions: "Were you physically able to work and available for work each day?" and "Were you seeking work?" Both questions were checked yes.

A Claimant Interview of May 14, 1976, lists four employment contacts. It states, "This is part of the work search I have made in the last month 15/6-17-6." (The words "part of" appear to be inserted and in the same ink as his signature thereto. The designations (15-17/76) are department terms for weeks ending April 7, 24, and May 1, 1976.)

A separate tribunal decision, docket No. 6-05913 dated June 25, 1976, in relation to another matter held in petitioner's favor, included a finding that he was available and actively seeking work during the weeks ending January 10 through May 8, 1976. It excluded the week ending May 15, 1976, because petitioner worked that week or received remuneration. See his Claim Record Card exhibit and that tribunal decision.

The petitioner testified at the hearing in a similar vein to his affidavit. He worked in his yard. He modified the affidavit by testifying that he did not spend all of his time at home, but did spend most of it there; he was able to do some things, but not others; he had mood swings; he did have some activities away from home, but cannot recall details now; he read the tribunal decision on its receipt, but he was so concerned with the merits of the quit that the advice about petition time did not sink in; his wife was "not up" on his unemployment compensation problem. When queried as to how he reconciled his claims for benefits for those 2 weeks in his condition, he stated that his contacts for work were mostly by phone during that period except for one in-person contact. He felt he was able to work and would have accepted a job or referral if offered. His diagnosis had been varied and shifting.

The petitioner was competent. He may have had an incipient ulcer. He had some psychological and emotional conditions during April 27 through May 3, 1976. He had marital and financial problems.

From the above, the undersigned frames the following:

Issue

Should the untimeliness of the petition be waived for good cause shown under RCW 50.32.075, on the basis that petitioner was unable to file it or cause it to be timely filed by reason of incompetency, or by reason of an impairment of psychological, emotional, or physiological nature so substantial and sustained as to constitute good cause for waiver?

From the issue as framed, the undersigned draws the following.

Conclusions

RCW 50.32.070 and 50.32.025 provide that a tribunal decision is final unless a petition is filed or postmarked within 10 days of the issuance or delivery, whichever is earlier. WAC 192-09-015 excludes the day of mailing and includes the last day, plus it excludes weekends and holidays. RCW 50.32.075, effective June 29, 1975, provides that for good cause shown, the untimeliness of a petition may be waived.

Under RCW 50.32.075, the commissioner has used the threefold criteria of (1) shortness of the delay, (2) absence of prejudice to the parties and the department and, (3) the excusability of the error or omission. *In re Beaughan,* Comm. Dec. 1295 (1975). As to the third criterion, we look to the acts of commission or omission and whether they were beyond the control of the petitioner. The three criteria were adopted from a California Supreme Court case involving a waiver of an untimely petition in an unemployment claim. *Gibson* v. *Unemployment Insurance Appeals Board,* 108 Cal. Rptr. 1, 9 Cal. App.3d 496, 509 P.2d 945 (1973) [PR-430.2-125, BSSUI]. Both cited cases involved a claimant who, within the 10 days, gave his case to a legal representative who agreed to file a petition. They were not filed due to error on the part of personnel. All sorts of situations have since been evaluated under the three criteria.

In the instant case, we entitled our heading "Evidence" rather than "Facts." We did this to set forth the pro and con evidence to show that all aspects were considered in reaching our evaluations and conclusions.

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First, we believe that petitioner was competent in the legal sense. Next we consider whether, by reason of an impairment of a psychological, emotional, or physiological nature so substantial and sustained there exists good cause for waiver of the untimeliness of the petition. We do not believe that the incipient or potentially recurrent ulcer precluded the filing. Assuming arguendo that he had hypoglycemia, we do not believe that it precluded him.

We are left with the psychological or psychiatric or emotional aspects. We grant that he had some or all of these. The question is whether there was an impairment of so substantial and sustained nature as to constitute good cause for waiver under the criteria of *Beaughan, supra*. We do not believe that petitioner was lying. Yet we are compelled to state that we believe he exaggerates to a degree when we compare his affidavit with his testimony and the other evidence in the case. For example, the affidavit states as a fact that for the 12 days following receipt of the decision he stayed home and did not go outside or see anyone, and that he was unable to function under any type of physical or mental stress. It states he had extreme fatigue. However, his testimony and the other evidence discloses that he worked long and hard in the yard. He did leave his property for some time. He was able to do some things, but not others. He did file claims for benefits for those weeks, stating he was seeking work, and that he was physically able to work and available for work. He made telephone contacts and at least one in-person contact for jobs during the period. He read the tribunal decision fully. By his own testimony it has been difficult for his doctors to diagnose his condition, to categorize it, and to assess the degree of it. See various letters and affidavits.

All in all, under the threefold criteria of *Beaughan*, we do not consider that petitioner established he was incompetent or that he had any impairment of so substantial and sustained nature during the period that he was unable to file a timely petition. Good cause for waiver was not established.

It is the undersigned's understanding of the oral opinion and written remand order of the Honorable Court that the above was the only aspect of good cause for waiver to be considered on remand. In the event it was not the only aspect, we consider that good cause was not established on other grounds.

The merits of the quit are not before the undersigned. However, as dicta we state we reviewed the record and concur with the tribunal's decision that petitioner quit without good cause. In brief, if it were before us, we would adopt the tribunal's finding of fact, with some modification to facts 2 and 3 concerning coffee breaks and the employer's letter of March 10, 1975, and to fact No. 5 (concerning what the petitioner reported concerning his separation) and the tribunal's conclusions (with modification to 5).

We consider that petitioner was competent and had no impairment of any nature so substantial and sustained as to find good cause for waiver of his untimely petition under RCW's 50.32.070 and 50.32.075. Nor do we find any other good cause for waiver. Now, therefore,

It is hereby ordered that the petition for review be hereby *dismissed*. The decision of the appeal tribunal of April 22, 1976, shall be deemed final. In accordance therewith, benefits shall be denied the petitioner beginning September 28, 1975, and until he has obtained work and earned wages of not less than his suspended weekly benefit amount in each of 5 calendar weeks, provided the disqualification shall not exceed beyond December 13, 1975, pursuant to the provisions of RCW 50.20.050.

THOMAS J. MORAN
Commissioner's Delegate

> when he is confronted with an issue which requires for its resolution a determination of the credibility of witnesses or the weight to be accorded certain evidence.
>
> . . .
>
> When a successor judge attempts to resolve questions of credibility and weight of evidence without having had an opportunity to hear the evidence and observe the demeanor of witnesses, *he is depriving a party of an essential element of the trial process.* (Emphasis added)

372 N.E.2d at 746. Judge Hoffman states that to hold otherwise would be to grant a power of review to the successor judge not even claimed by appellate courts.

While *Urbanational* did not involve an administrative fact finding process, it cannot be said that observations of an administrative trier of fact are any less critical, especially to the extent material facts in the case depend upon the determination of credibility of witnesses as shown by their demeanor or conduct at a hearing. In *City of Mishawaka* v. *Stewart,* (1974) 261 Ind. 670, 310 N.E.2d 65, our Supreme Court acknowledged that proceedings before administrative bodies are not required to be conducted with all the procedural safeguards afforded by judicial proceedings; however, the court expressly noted the existence of certain minimum procedural requirements:

> There are, nevertheless, standards below which we should not go. These standards, logically, should be at the highest level that is workable under the circumstances.

310 N.E.2d at 68. By requiring an administrative procedure conducted at the "highest level that is workable under the circumstances," the court recognized that considerations of administrative efficiency and convenience cannot devour what must remain a fair and meaningful agency determination in accordance with due process.

In the case of *Gamble-Skogmo, Inc.* v. *Federal Trade Commission,* 211 F.2d 106 (8th Cir. 1954), the original trial examiner was retired automatically at the age of 70 and relieved of further duties after having heard all the evidence. A new trial examiner, after a cold-print reading of the record, issued findings of fact and conclusions which constituted a recommended decision to the commission. The commission adopted both the findings and conclusions of the second trial examiner. On appeal, the company argued it was denied due process when the commission refused to grant a *de novo* receiving of evidence before the second hearing examiner. The court stated:

> The object and the consequence of this guaranty [that the decision be made by the examiner who had conducted the hearing and received the evidence] would inherently be to make direct credibility evaluation by a trial examiner constitute a processive element or factor in arriving at intermediate administrative findings, conclusions and decisions, submitted to the agency . . . The opportunity to make that evaluation on a direct basis, and the contribution to the soundness of a result from this having been done . . . have generally been regarded, in the processive aspect of attaining justice, as inherently tending to more probable fairness and readier acceptance of . . . quasi-judicial decisions. (Bracketed material supplied.)

211 F.2d at 113. The court in *Gamble* emphasized that after review of the record, it was clear the second trial examiner's recommended decision was based in controlling measure upon the credibility evaluation which he made between the opposing witnesses in their irreconcilable testimony. The court then remanded the case for a *de novo* receiving of evidence.

Other courts have reached similar results. In *Ashbury Park* v. *Department of Civil Service,* (1955) 17 N.J. 419, 111 A.2d 625, the Civil Service Commission's decision reversing the suspension of two policemen for conduct unbecoming an officer was held invalid by the Supreme Court of New Jersey. The policemen were originally suspended for their involvement with two women. However, the women's testimony was heard by only one commissioner; and the testimony of the remaining witnesses, including the police officers, was heard by two other commissioners. The court stated:

> [F]airness and impartiality can only be assured when the members participating in the deliberations and decision of the board or commission, following a hearing on employee performance, have had an equal opportunity to hear and evaluate all of the evidence at the hearing.

111 A.2d at 626.

In *Feldman* v. *Board of Pharmacy*, (1960) (D.C. Mun. App.), 160 A.2d 100, *affirmed* 279 F.2d 821, the District of Columbia Pharmacy Board denied Feldman's application for renewal of his pharmacist's license on the grounds that Feldman had willfully filled prescriptions incorrectly. Feldman claimed he was denied due process because his case was decided by four board members who were not present at the hearing of testimony. The court noted Feldman's denials of wrongdoing had been emphatic and there were important areas where credibility of witnesses was a vital factor. Holding that the circumstances required the board to exercise judgment judicial in nature in weighing and appreciating the credibility and persuasiveness of testimony by personally hearing the witnesses, the court stated:

> [W]hen that opportunity is lacking and weight and credibility of evidence are invoked, there is also lacking an essential ingredient of due process.

160 A.2d at 103.

In this case, the need for a meaningful credibility evaluation is readily apparent. Addison, the claimant, and Brown, the employer's representative, where the only witnesses. Addison testified he told Brown he would most likely return to work on Thursday or Friday of the week in question. Brown denied Addison made any such statement, and instead testified Addison would not say if he would *ever* return to work. Had Addison been believed, he could not have been found discharged for just cause; one cannot be expected to predict the course of one's illness with certainty. If, however, Brown is believed, Addison's termination was for just cause. The discrepancy in the witnesses' testimony can hardly be attributed to faded memories. A credibility judgment was *the* determinative factor. We believe that in a case such as this, where the material issue requires for its resolution a determination of the credibility of witnesses, due process requires a meaningful credibility evaluation by the administrative trier of fact.[1] We find a meaningful evaluation was lacking in this case.

Referee Atz, who issued findings of fact and conclusions which were later adopted by the review board, did not make an independent judgment as to the credibility of the employer's representative, Farron Brown. The referee adopted as true the contradictory testimony of a witness he did not question or observe. While referee Kivett did hear the testimony of Brown, Kivett was not the trier of fact. While Atz did hear the testimony of Addison, he heard only half the evidence to be weighed. Due process requires the administrative trier of fact to hear all the evidence necessary to make a meaningful credibility evaluation. We believe this standard is consistent with our Supreme Court's declaration that the administrative process operate at the "highest level" workable under the circumstances. While wide latitude is allowed an administrative body in the conduct of its hearing, due process must be afforded those whose rights are affected. *Ervin* v. *Review Board of Indiana Employment Security Division, et al.*, (1977) Ind.App., 364 N.E.2d 1189.

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[1] Appellees argue that the review board, and not the hearing referee, is the ultimate trier of fact at the agency level, and therefore, if the board can make *de novo* findings based upon the record, Addison cannot be prejudiced because different referees heard the evidence. However, this argument ignores the fact that the review board often relies on the referee's ability and opportunity to make direct credibility evaluations and adopts (as it did in this case) the findings of the hearing referee in toto, without receiving additional evidence.

The decision of the review board is therefore *vacated*, and this case is remanded for a new hearing by the Employment Security Division.

MILLER, P.J. AND YOUNG, J., concur.

READEX FICHE

Pennsylvania B

Decision of Board of Review
November 27, 1979

No. B-175518-B

Time:
Part-time or full-time

Suitable work 195.05, 450.4

A telephonist, employed part-time at $3 an hour, had begun work in January 1979. He had been employed previously from July through November 1978, by the same employer as a home-care coordinator under the CETA program at $4.50 an hour; he was separated when the program ceased. Prior to separation, his employer, because of respect for his accomplishments, invited him to consider other job possibilities. However, he did not respond, and nothing was heard from him until sometime in January 1979, when he was offered full-time work as a telephonist. He accepted on a part-time basis, refused full-time employment because it was adverse to his prior experience and earnings record as well as to his training and vocational development in business administration. Thus, while working part-time as a telephonist, he sought full time work in line with such vocational proficiency. *Held*, reversed since, in the final analysis, he had not refused *suitable* work; the work offered was unsuitable in view of his prior occupational background.

Findings of Fact

Claimant was last employed by the employer as a telephonist at $3 per hour. He had started his last period of employment January 23, 1979, and was working part-time during part of the period involved in this appeal.

Prior to his last period of work, the claimant had been employed by the same employer from July 1, 1978, through November 19, 1978, as a home-care coordinator under the CETA program at $4.50 per hour. The claimant was separated from this employment on November 19, 1978, because the program ended.

Prior to the separation in November 1978, the employer asked the claimant to come in and talk about several other job possibilities because the employer was very pleased with his work. The claimant did not report to the employer to discuss any of the job possibilities, and the employer had no further contacts with him until sometime prior to January 8, 1979, when the claimant was offered the telephonist job on a full-time basis.

Although the full-time work as a telephonist was available to the claimant, he accepted the position only on a part-time basis because he did not consider the work compatible with his past experience and earnings record.

While working part-time as a telephonist, the claimant continued to search for a full-time job compatible with his past work experience. The claimant worked part-time during the claim weeks ending January 27 and February 3, 1979.

The claimant has a weekly benefit rate of $97 and a dependents' allowance of $8.

The claimant's prior training and work experience is in the area of business administration.

Discussion

The Office of Employment Security issued a determination denying benefits to the claimant. The claimant filed an appeal therefrom and, following a hearing at which the claimant, represented by counsel, a witness for the claimant, and the employer representative appeared and testified, the referee issued a decision affirming the office's determination. Thereafter,

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the claimant filed a further appeal from the referee's decision and requested an opportunity to present oral argument before the board. Oral argument was held before the board on May 30, 1979. Following oral argument, the board of review remanded the case to a referee, acting as hearing officer for the board, and the claimant, represented by counsel, and the employer representative appeared and testified at the remand hearing. The board of review affirmed, as modified, the referee's decision, after which the claimant requested reconsideration and an opportunity to present oral argument, which were granted. Oral argument was again presented before the board by counsel for the claimant and an employer representative on October 31, 1979.

Section 402(a) of the Pennsylvania Unemployment Compensation Law provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, *or to accept suitable work* when offered to him by the employment office or by an employer. The good cause is based upon good faith.

Additionally, Section 4(t) of the law provides, in part, that in determining whether or not proffered work is suitable, it is appropriate to consider, among other factors, the length of time the individual has been unemployed and the reasons therefore, the individual's prior training and work experience, the individual's previous earnings, and the prevailing wage rate in the individual's usual trade or occupation.

In the instant case, the claimant chose to accept a position, which was available on a full-time basis, on a part-time basis because he believed that the position was not compatible with his prior work record. Applying the criteria of suitability set forth above in section 4(t) of the law, the board is of the opinion that the telephonist position which the claimant accepted on a part-time basis was not "suitable" employment and, therefore, the claimant had good cause for accepting the position only on a part-time basis. More specifically, the record discloses not only that the disparity in pay between the claimant's last employment and the telephonist position was approximately 33 percent, but also that the telephonist position entailed job duties inconsistent with the claimant's prior job experience and training. On balance, a consideration of all factors pertinent to a determination of the suitability of proffered work leads to a conclusion that the telephonist position which the claimant declined to accept on a *full-time* basis was not suitable employment within the meaning of section 402(a) of the law. It therefore follows that the claimant is not ineligible for benefits under section 402(a) of the law.

Finally, the board notes that, since the claimant is eligible for benefits, there is no overpayment in the present case.

Conclusion of Law

The claimant is not ineligible for benefits under the provisions of section 402(a) of the Pennsylvania Unemployment Compensation Law. There is no overpayment in the present case.

Order

The decision of the referee is *reversed* and benefits are granted. There is no overpayment to be recouped in the present case. The case is remanded to the Office of Employment Security for a determination of the amount of benefits to which the claimant is entitled during the claim weeks ending January 27 and February 3, 1979, during which the claimant worked part-time.

UNEMPLOYMENT
COMPENSATION BOARD
OF REVIEW

MAURICE ABRAMS, *Chairman*
JOSPEH J. MCANENY, *Member*
JAMES P. BRESLIN, *Member*

Wisconsin

CIRCUIT COURT
DANE COUNTY

August 6, 1979

MILWAUKEE COUNTY *v.* WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND JOHN RAUSCHENBERGER

Citizenship or residence requirements

Miscellaneous 375.3
Misconduct 135.3
Voluntary leaving 50, 70, 190.15, 495

To avoid discharge for failing to meet residency requirements, a county employee for 19 years resigned to preserve his pension. After buying a "retreat" home several years earlier in another county while maintaining residence in the employment county, he and his wife divided their time equally between both homes. His employer ultimately initiated termination proceedings because of the employee's residency in another county. The proceedings were rescinded after the county accepted claimant's resignation. Employer demonstrated no evidence of a residency rule or criteria. *Held,* resignation was not voluntary because it was a reasonable reaction to employer's notice of proceedings concerning claimant's violation of the residency rule. Further, credible evidence of establishing such a rule's criteria was absent, and the necessity for doing so was sufficiently conveyed by the hearing notice. The subsequent findings of fact by the appeal tribunal and the commission's affirmance effectively validated any aspect of credibility in this respect. Finally, the evidence did not indicate claimant had violated the employer's residency rule; the purchase and use of a second home or "retreat" merely reflected a common practice — obtaining a vacation sanctuary.

This is an action by the plaintiff county to review a decision of the defendant Labor and Industry Review Commission (hereafter the commission) dated July 12, 1978, entered in an unemployment compensation proceeding. This decision reversed a decision of the appeal tribunal in favor of the county and determined that defendant Rauschenberger (hereafter the employee) was eligible for unemployment compensation benefits, if otherwise qualified.

The gist of the appeal tribunal's decision is set forth in this finding:

> The employee worked during about 19 years for the employer, a county, beginning as a for failing to meet the employer's residency requirement; and he wanted to preserve his right to receive his pension on a deferred basis, which only could be done if he resigned. Clearly this is a personal reason and does not permit the immediate payment of unemployment benefits.

The commission's findings of fact and conclusions of law read:

> The employee worked during about (sic) 19 years for the employer, a county, beginning as a welfare worker and, as of September 1973 and continuing thereafter, as an information officer. His last day of work was August 5, 1977 (week 32), when the employment relationship terminated.
>
> In the year 1969, the employee purchased property in the country for the purposes of a retreat. He and his wife continued to maintain a residence within the boundaries of the employer-county. Beginning in 1974, he and his wife divided their time equally between the country retreat and the county residence. On July 30, 1976, (week 31), the employer notified its workers that it would begin to enforce a residency rule after December 31, 1976 (week 1). On July 22, 1977 (week 30), the employer notified him that written charges had been filed that he had willfully violated the employer's residency rule by residing in another county. On July 27, 1977 (week 31), the employer notified him that a hearing on cause for his discharge would be held on August 8, 1977 (week 33), later rescheduled for August 10, 1977 (week 33). On

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> August 3, 1977 (week 32), he tendered his resignation, effective August 5, 1977 (week 33), because he believed the result of the hearing would be a discharge from employment and he desired to preserve the annuity provisions of his pension, which could only be preserved by his resignation. On August 10, 1977 (week 33), the employer discharged him for violation of its rule. On August 11, 1977 (week 33), the employer rescinded the discharge and formally accepted his resignation. At the hearing, the employer adduced no testimony or evidence establishing that the employee had violated its rule. Moreover, it provided no criteria it considers when deciding whether its rule has been violated. Maintenance of two residences does not per se establish residency at one of the locations. Hence, it was not established that the employee violated the employer's residency rule.
>
> The employee's resignation was submitted in the good faith belief that he had no reasonable means of continuing his employment. Under the circumstances, termination of the employment relationship was clearly initiated and induced by the employer and cannot be considered, for unemployment compensation purposes, as a voluntary quitting. . . .
>
> The Commission, therefore, finds that in week 32 of 1977 the employee did not voluntarily terminate his employment within the meaning of sec. 108.04(7)(a) of the statutes, and that in week 32 of 1977 he was discharged but not for misconduct connected with his employment, within the meaning of section 108.04(5) of the statutes.

The commission, in compliance with the requirement of *Trans-America Ins. Co.*, v. *ILHR Department*, 54 Wis.2d 272, 195 N.W. 2d 656 (1972), attached this memorandum to the foot of its decision immediately below the signatures of the two participating commissioners:

> NOTE: In reversing the appeal tribunal decision, the Commission considers that the actions of the employer induced the employee to terminate his employment and that the appeal tribunal failed to consider that the Civil Service Commission did discharge the employee and rescinded the discharge only to accept his resignation. The Commission further considers that the appeal tribunal failed to consider that the employer did not establish that the employee had violated its residency rule, nor did the employer make any attempt to introduce or establish competent evidence upon which its determination was made that the employee had violated its residency rule, nor did the employer make any attempt to introduce or establish competent evidence upon which its determination was made that the employee had violated its rule and that the appeal tribunal failed to take into consideration the realistic alternatives available to the employee at the time.

The Issues

The court deems that the issues presented by the county which it should resolve are:

(1) Whether there is any credible evidence in the record to support these findings:

(a) "That termination of the employment was clearly initiated and induced by the employer and cannot be considered, for unemployment compensation purposes, as a voluntary quitting."

(b) "At the hearing the employer adduced no testimony or evidence establishing that employee had violated its [residency] rule. Moreover, it provided no criteria it considers when its rule has been violated."

(2) Whether the notice of hearing before the appeal tribunal so limited the issue to be determined as to have excused the county from presenting any evidence that the employee had violated its residency rule.

(3) Whether the commission acted in excess of its powers in basing its decision upon the synopsis of the hearing prepared by the examiner sitting as an appeal tribunal without playing back the tape recording of the proceeding or having a transcript thereof, or without consulting with the hearing examiner as to credibility matter.

(4) Whether the commission made an erroneous determination as a matter of law in reversing the appeal tribunal's decision.

The county's brief also attacks a finding or conclusion made not quoted above that, if there had been a quitting of his employment by the employee, such quitting would have been with good cause attributable to the employer. Because this finding or conclusion was not material to the result, the court deems it unnecessary to resolve the correctness of the same.

The Court's Decision

A. *Evidence to Support Questioned Findings.*

The first of the two commission findings quoted above which the county has attacked as not being supported by credible evidence found that the employee's termination of employment had been initiated and induced by the county and cannot be considered as a voluntary quitting for unemployment compensation purposes.

The court is of the opinion that this finding is supported by the following testimony given by the employee (Tr. 22-23):

Q. Now, why did you decide to resign?

A. There was a question in my mind, after talking to people in the Department, as to what happens to your pension and I wanted to protect my pension rights. I didn't want to be paid in any lump sum. I wanted to be able to take that at retirement age.

Q. Okay, now, was there a question because of the residency requirement? Is that how it all started?

A. The pension?

Q. No, the question arose because you were afraid you were going to be fired because of the residency requirement.

A. I knew I would be discharged.

Q. And how did you receive that information that you were more or less likely to be fired because of the residency problem?

A. Through this.

Q. Through the notice of the hearing?

A. Where it says you deny there is good and sufficient charge for your discharge.

Q. Okay, so you decided to resign instead because of the pension, is that correct?

A. Since the inevitable fact would be discharge, yes. The county was making no exceptions except for their select list.

Q. And why would it be advantageous for you to resign rather than be fired in regard to the pension plan?

A. Because if the county lumps you out, they pay you a flat amount as to what you have contributed in it. And I didn't want that to happen. . . ."

From this testimony, considered as a whole, the commission could draw the reasonable inference that but for the county having given the notice of hearing with respect to the employee's violation of the residency rule, and his belief this hearing would result in his discharge, he would not have resigned and therefore, his resignation was not a voluntary act on his part.

The county's brief quotes testimony given at pages 2, 18, and 19 of the transcript which it contends is inconsistent with the above-questioned finding. Even if it were inconsistent with such finding, this does not render incredible the testimony quoted above. The weight of the testimony and the resolving of any inconsistency in a witness's testimony is solely for the commission to determine.

The second finding attacked by the county is the one which found that it had adduced no testimony or evidence establishing that the employee had violated the residency rule, and had provided no criteria it considered when its rule has been violated. The court assumes what was meant to be stated by the commission in the last portion of this finding would have been more accurately stated if the words "in determining whether" had been substituted for the word "when."

The evidence adduced by the county on the issue of whether its residency rule had been violated by the employee consisted of the transcripts of the August 10, and August 11, 1977, meetings of the County Civil Service Commission (exhibits 1 and 3). The August 10 meeting was the hearing on the charges brought against the employee that he had violated the residency rule. The corporation counsel, in behalf of the county, adduced no testimony but offered in evidence two exhibits. The first was the investigative report of the sheriff's department, and the second was a certified copy of the deed dated May 9, 1969, by which the Waukesha County property had been conveyed to the employee and his wife. Neither of these exhibits was attached to the transcript (exhibit 1), nor presented at the hearing before the appeal tribunal. The second transcript (exhibit 3) merely shows that the Civil Service Commission reconsidered and rescinded its action of the previous day discharging the employee, and accepted his resignation.

Neither exhibit 1 nor exhibit 3 contain any competent evidence that the employee had violated the residency rule.

The testimony given by the employee at the hearing before the appeal tribunal did not establish a violation of the rule in establishing that his legal residence was in Waukesha County and not Milwaukee County. As the commission stated in its findings, "Maintenance of two residences does not per se establish residency at one of the locations."

The county's brief points to no evidence adduced at the hearing before the appeal tribunal showing the criteria the county considers in determining whether a violation of its residency rule has occurred.

The court concludes that there was credible evidence to support this second attacked finding.

B. *Whether the Notice of Hearing Before the Appeal Tribunal Was so Worded as To Excuse the County from Presenting Evidence as to the Claimed Residency Rule Violation.*

The notice of hearing mailed by the Department of Industry, Labor and Human Relations (DILHR) to the county and to the employee notifying them that a hearing would be held on October 20, 1977, in the matter of the employee's claim for unemployment benefits stated:

> Issue or issues appealed from: Quit

The county's brief asserts:

> The plaintiff contends that its burden of proof as to the issue of quit did not require it to adduce evidence as to Mr. Rauschenberger's violation of its residency rule.

This statement of the issue in the notice of hearing certainly was adequate to apprise the county that the voluntariness of the employee's resignation was a question to be gone into at the hearing. It was the county's theory that the employee had violated its residency rule and was well aware this was so when he received the notice of the hearing before the Civil Service Commission; and that he elected then to resign for the personal reason of gaining more advantageous pension rights. If the county had been able to prove this in the absence of any complicating factors, it may well have prevailed either before the commission or this court on the quit issue. The court is of the opinion that the DILHR notice of hearing was adequate to permit the county at the hearing to present evidence with respect to the employee's alleged breach of the residency rule.

C. *Failure of Commission To Have Tape of Hearing Played Back or Having Been Provided with a Transcript, or Consulting with the Hearing Examiner as to Credibility Matters.*

Here the commission relied on the synopsis made by the hearing examiner sitting as the appeal tribunal for the testimony presented at the hearing without having the tape of the hearing played back, and without a transcript having been made of the tape. The court understands this is a common practice of the commission in unemployment compensation proceedings.

The issue is whether the commission acted in excess of its powers in so doing. The court is of the opinion that, in order for it to reverse for any procedural error on the ground the commission acted in excess of its powers, the procedural error must have been of a nature amounting to a denial of due process. The county has pointed out no material error or omission in the examiner's synopsis in light of the transcript. Therefore, the court must assume the synopsis was fair and adequate, and the commission did not act in excess of its powers in grounding its findings of fact upon the synopsis and the exhibits.

The record does not affirmatively disclose that the commission consulted with the examiner before entering its decision. It is the court's understanding that the commission is required to consult with the examiner only when it reverses the examiner's findings of fact in a situation where the examiner, in arriving at his findings, necessarily had to pass on the credibility of witnesses. See, *Transamerica Ins. Co.* v. *ILHR Department, supra,* at page 282. The court does not read *Appleton* v. *ILHR Department,* 67 Wis.2d 162, 276 N.W. 2d 497 (1975) as requiring such a consultation where credibility of witnesses is not involved.

A review of the appeal tribunal's findings of fact, and a reading of the commission's memorandum appended to its decision, has satisfied the court that no finding of fact made by the appeal tribunal which depended on the credibility of witnesses was reversed by the commission.

D. *Whether Commission Made an Erroneous Determination as a Matter of Law in Reversing the Appeal Tribunal's Decision.*

The county grounds its contention that the commission made an erroneous determination as a matter of law in reversing the appeal tribunal's decision upon the holding of this court in its memorandum decision in *Swessel* v. *Labor and Industry Review Comm. and City of Milwaukee,* Case No. 161-162 (November 6, 1978).

In *Swessel,* the employee Swessel intentionally changed her residence and moved outside of the city of Milwaukee, knowing she was in violation of the residency rule embodied in a city ordinance, and that this violation of the rule would require her to terminate her employment when it became known to her employer. When this violation was discovered through a departmental investigation and she was requested to submit her resignation, she did so. The appeal tribunal determined that the employee had terminated her employment with the employer within the meaning of section 108.04(7), Stats., and that such termination was not within any of the exceptions to such statute. On review, the commission affirmed and so did this court. This court in its decision cited the rule set forth in *Dentici* v. *Industrial Comm.*, 264 Wis. 181, 186, 58 N.W. 2d 717 (1953) [VL-515.9-17, BSSUI], as follows:

> . . . Here it must be held that there was a voluntary termination of employment by the employee, because the evidence shows that by his acts he intended to leave his employment rather than accept a transfer. When an employee shows that he intends to leave his employment and indicates such intention by word or manner of action, *or by conduct inconsistent with the continuation of the employee-employer relationship*, it must be held, as the Industrial Commission determined here, that the employee intended and did leave his employment voluntarily and by refusing to accept the transfer left without good cause attributable to the employer . . . (Emphasis added.)

The court held that under this rule the employee had terminated her employment when she knowingly violated the residency rule, continued compliance of which was a condition of her employment.

In the instant case, the evidence does not establish that the employee had violated the county's residency rule. He purchased and made use of the Waukesha house as a second home or retreat, just as many persons purchase a vacation cottage which is usable throughout the year, winter as well as summer.

The court determines the commission committed no error of law in reversing the appeal tribunal's decision.

Let judgment be entered *confirming* the commission's decision, which is the subject of this review.

BY THE COURT:

GEORGE R. CURRIE
Reserve Circuit Judge

Washington B

Decision of Commissioner's Delegate
November 30, 1979

No. 29640

Good Cause

Voluntary leaving 155.2, 160, 210, 365.25

A technical library assistant at an airplane firm in Washington State quit to follow her husband to Wichita, Kansas. Accordingly, she gave notice and, on arrival, applied for work at employer's branch there — continuation of employment based on enjoyment of her work and desire for similar duties; however, such work was unavailable. Employer contended, affirmed on appeal, that the separation had not been for good cause, as she had not first exhausted reasonable alternatives (such as requesting transfer or a leave of absence). Claimant considered this unrealistic under the then-prevailing circumstances. *Held,* reversed, the leaving was for a compelling personal reason and she had exhausted all alternatives then *reasonably* present. Those cited by the employer were not rationally in existence at the time.

Findings of Fact and Reasoning

Claimant duly petitioned the commissioner for a review of a decision of an appeal tribunal entered in this matter on October 12, 1977, holding that she was subject to disqualification under RCW 50.20.050 for leaving work voluntarily without good cause. The petitioner had originally been allowed benefits in the matter and received all the benefits that she claimed.

The basic facts are these: The petitioner was employed as a technical library assistant by the employer at its facilities in Renton, Wash. She voluntarily left that work, solely for the purpose of moving with her husband to Wichita, Kans. On February 9 or 10, 1976, her husband, who was then unemployed, was offered, and he accepted, a permanent job with a company in Wichita that was to start no later than March 1. In light of this, the petitioner gave notice to the employer that she would be quitting on Friday, February 20, in order to move with her husband to Wichita. On February 20 she left her job, and on the following Tuesday, February 24, the petitioner and her husband, with their belongings, left for Wichita, arriving there Friday, February 28. The following week, the petitioner's husband reported for work, and the petitioner applied for work at her former employer's Wichita facilities. The petitioner enjoyed her job with the employer in Washington State, and was desirous of obtaining like work at its branch in Wichita. However, when she applied for work there, and thereafter renewed her application, she was told there were no opening.

Employer argued, and the appeal tribunal decision agrees, that because the petitioner had failed to inquire about a transfer to its Wichita branch and/or a leave of absence prior to leaving her Renton job, it could not be held that she left her job with "good cause" because without such steps she had not exhausted every reasonable alternative to maintaining her employment. The petitioner essentially argued that it would not have ordinarily occurred to a person in her circumstances that a request for a transfer to Wichita and/or a leave of absence were reasonable alternatives to quitting with proper notice and immediately applying for work with the employer upon arrival in Wichita. Hence, she should be held to have left with "good cause." In our opinion, both the law and the evidence are in the petitioner's favor.

It is true that in finding "good cause" for leaving work, we have long held that it is necessary for the individual to exhaust all reasonable alternatives to quitting. The rule is presently embodied in WAC 192-16-009(1)(c). It does not require that all possible alternatives to quitting be pursued, only "reasonable" alternatives. And the reasonableness of an alternative is to be judged from the time and circumstances of the leaving, rather than in the abstract or in hindsight. See, for instance, *In re Bowie,* Comm. Dec. 155 (1955). In *In re Hoffman,* Comm. Dec. 994, at 4 (1973), we said:

> . . . It is true that an employee must make every reasonable effort to preserve his employment and this could include requesting a transfer to different work. But the duty to make such a request only arises when the circumstances indicate that a reasonably prudent person would ordinarily take such a step prior to quitting. . . .

In the present case, the petitioner was aware that the employer accepted transfer requests and, in fact, had submitted such requests in times past. (According to the testimony, her past requests had been in response to Seattle-area openings published in the company newspaper). But according to her uncontradicted testimony, which was entirely credible, she was further aware from past experience that it was more than a month before her requests were acted upon, and by that time she would already be in Wichita. Thus, she had no reason to believe that her request would be more quickly acted upon in this instance, especially since she was aware that the Wichita branch was undergoing heavy layoffs at the time. She was further aware that the company expected due notice of resignations from employees in order to consider them favorably to reemployment and that from the time she learned of the move to Wichita to the time she had to leave work, there were only eight working days. Unless we are to ignore the circumstances of the case, we cannot say that a prudent person would ordinarily have viewed a transfer request as a reasonable alternative to simply applying for work at the Wichita branch upon arrival there.

The employer perhaps realizes the apparent futility of the petitioner's obtaining a transfer prior to her departure from her Renton job but points out that she could have been given a "leave of absence" under company policy. An ordinary leave of absence, of course, would not appear to a person in the petitioner's circumstances as a reasonable means of preserving her employment because she was permanently moving from the area. Employer refers to a special "leave of absence" provided for in its company policy manual. See exhibit No. 24, page 6, item H. Under this arrangement, a person moving from one company location to another is given a "leave," which normally will not exceed 60 days, during which the company tries to locate openings in the new location for which the person qualifies. A "leave" of this sort does not serve as a commitment by the company to provide employment to the individual and, if the person is not placed within the "leave" period, he or she is terminated by the company as though there had been a resignation. If there are openings at the new location, the individual is promised precedence over "new" or "rehire" candidates if the individual's qualifications are at least comparable to those of such candidates. See exhibit No. 23, page 1.

However, the petitioner was unaware of the special leave provision, and there is no basis for saying that she should have been aware of it. According to the testimony, the company does not take affirmative steps to inform employees of this special procedure. The petitioner fully explained her reasons for leaving, but neither her supervisor nor her exit interviewer mentioned the special leave procedure. In view of the foregoing, we cannot say that a prudent person would ordinarily have viewed a leave request as a reasonable alternative to simply applying for work at the company's Wichita branch upon arrival there.

The circumstances of the present case are not materially different from those in *In re Bale*, 63 Wn.2d 83, 385 P.2d 545 (1963) [VL-210-79, BSSUI]. The petitioner's decision to follow her husband to Wichita constituted a compelling personal reason for leaving her work, and nothing in the Equal Rights amendment would dictate a contrary conclusion. See *In re McGhan*, Comm. Dec. (2d) 185 (1976). Of course, under the present law, a marital or domestic quit of this sort would require a temporary disqualification, whether or not the petitioner took reasonable measures to preserve the employment. See Laws of 1977, 1st Ex. Sess., chapter 33, section 4. And now, therefore.

Opinion

It is hereby ordered that the decision of the appeal tribunal entered in this matter on the 12th day of October, 1977, shall be set aside. The claimant is not subject to disqualification under the provisions of RCW 50.20.050.

DAVID J. FREEMAN
Commissioner's Delegate

Kentucky A

Decision of Senior Hearing Officer
August 24, 1979

No. 79–6345

Suitability of work

Voluntary leaving 190.15, 235.05, 385, 425

For the sake of greater earnings, a school teacher and vocational counselor, who had never engaged in saleswork, embarked on a career of selling life, health, and casualty insurance. However, she had never been convinced of the necessity of life insurance and, accordingly, had never paid premiums on her own policy. In her first 6 months, her sales were acceptable; however, in her last 2 months, her sales declined due to the conflict between her temperament and the realities of work. Psychologically, the impasse induced anxiety and depression. Separation inevitably resulted to assure her emotional stability. Paralleling her basic psychic disturbance were personal problems, admittedly material to an agitated state of mind. Her oldest daughter unexpectedly joined the armed forces, and mortgage foreclosure was threatened. She resigned. *Held,* voluntarily quit without good cause because, in the final analysis, employment conditions, of which she essentially was aware, had not changed; suitability, therefore, was not a relevant justification. Also, competent evidence of occupational factors leading to health deterioration, sufficient to justify separation, were absent. Although an adverse occupational environment existed psychologically, the material relevance of the personal blows she suffered could not be discounted. Thus, while she felt she could not continue, proof was lacking that it was unavoidably due to health or other incapacity.

Findings of Fact

Claimant was employed with insurer for 10 months, selling life, health, and casualty insurance. She had never previously done saleswork, but had decided to abandon her prior career in school teaching and vocational counseling for what she hoped would be a more lucrative livelihood.

She had never paid premiums on a policy covering her own life, and admittedly was not then, and is not now, convinced of the necessity of life insurance. Her sales were nonetheless acceptable during her initial 6 months of service. It was in her final 2 months, during which her sales declined, that she finally concluded that her temperament and the demands of her job were irreconcilable. She and her two witnesses, both personal friends with backgrounds in psychology, assert that she was anxious and depressed in her final months of employment and that quitting her employment was essential to the recovery of her emotional health.

It was likewise during claimant's final months with the company that she experienced certain emotional traumas from events in her personal life. Her elder daughter unexpectedly left home to join the armed services. The financial institution holding the mortgage on her home threatened a foreclosure suit. She acknowledges that these matters played a role in her disturbed emotions.

She resigned on June 21, 1979, asserting that she no longer had the commitment to pursue her job.

Decision

The adjusted determination is *affirmed.* (Voluntarily quit without good cause. Benefits denied from June 17, 1979 until no longer unemployed.)

READEX FICHE

Reasons

KRS 341.370 (2)(c) provides that a worker be disqualified from benefits for the period of unemployment that follows the voluntary leaving of suitable work without good cause.

Work becomes unsuitable when the employer unilaterally alters terms or conditions to the worker's material detriment. But a worker is hard-put to characterize as unsuitable unchanged terms or conditions of which she was aware, or should have been aware, when she first accepted the work. As a former vocational counselor claimant, more than most, she should have been aware of the aspects of insurance sales that she later came to view as intolerable.

It is nonetheless true that employment which a worker accepts as suitable at its outset may later become incompatible with her health because her health has changed. The central question in the present case is whether there is reliable proof of such a change or such an incompatibility. At minimum, such proof should include competent medical evidence. There is no such evidence in this record. Claimant's witnesses have backgrounds in psychology. But their testimony, even if considered expert, does not clearly establish the source of her tensions. It could as easily have been the concurrent personal problems she was encountering. And if it were the latter, it is difficult to ascertain how she served her health by quitting her job.

She could have done so only if her emotional disturbance, whatever its cause, had assumed such proportions as to prevent her, psychologically, from coping with her job. There is simply no convincing proof that her health changed to that extent or that her capacity for her work was reduced to that degree.

Within the meaning of the law, claimant voluntarily left suitable work at the company without good cause.

ROBERT NIXON
Senior Hearing Officer

Kentucky A

Decision of Hearing Officer
August 28, 1979

No. 79–6139

Suitability of work

Voluntary leaving 425, 515.5

An auto dealer's credit secretary, employed 3 years, was reassigned to bookkeeping work in leasing. Her salary was raised by 60 cents an hour to $4. Three months later she inquired about a further raise and kept asking for several months. While not promised a raise she was told periodically by her supervisor that a raise was being considered. A year later, at a company dinner, the treasurer, who was intoxicated, conditioned a reward on the basis of an improper sexual advance, if she acceded. She refused; his reaction was that while he admired her she was foolish. Functionally she had had frequent contacts with the treasurer; thereafter he avoided her. A week later she asked another official for a raise, referred to the incident, and asked if such acquiescence was necessary. He denied it was, and said he sould advise her about the raise after discussion with her supervisor. Several weeks later she learned from the supervisor that he had not been approached. She gave 3 days' notice and was offered a 50-cent an hour raise, which she refused as a "matter of principle." *Held*, voluntarily quit without good cause because the circumstances did not eliminate reasonable alternatives. Although generally seaparation would be justified where compromising moral principles were involved, such was not the case here. The individual was drunk when the discussion arose and thereafter avoided her; it was an unrepeated isolated instance, and the vice president indicated disapproval. Of major import, despite her contention that it was her reason for leaving, she remained at work for many weeks and only left after fruitless wage requests. Since wage rates are set by employer and assuming they were consistent with community standards, her dissatisfaction does not support termination.

Findings of Fact

Claimant worked for the company for almost 3 years. Originally hired as a secretary in the credit department, she was transferred in May 1978 to a job as bookkeeper for the company's leasing business. At the time of the transfer, she was given a raise of 60 cents per hour, bringing her total salary to $4 per hour. About 3 months later, claimant first began asking about a further raise. She was never promised one, but was told by her immediate supervisor that he was looking into it for her. Claimant checked with him every month or so thereafter and was repeatedly told that her request was being considered. This went on for several months.

On May 17, 1979, claimant attended a company dinner. During the course of the evening, claimant was approached by the corporate treasurer while claimant was standing with another female employee. The treasurer appeared to claimant to be drunk. While in the presence of the other employee, he propositioned claimant, asking her to have sexual relations with him, in exchange for which he said she could "have anything in the company if she plays the game." Claimant refused, whereupon the treasurer told her he admired her but that she was a fool.

As bookkeeper, claimant's job required her to consult with the treasurer frequently for his approval on lease agreements. She did not see him again until the second day after the dinner. They did not speak, and the treasurer appeared to be avoiding her. Claimant went about her work as usual and, although they did speak to each other later on several occasions, the incident at the dinner was never discussed.

About a week after the dinner, claimant spoke to the company vice president to ask when she might expect a raise. She informed him about the treasurer's advances and asked if that was what it would take to get a raise. The vice president said he "did not think so." He said he would discuss her request with her department manager and let her know. Claimant waited several more weeks and, hearing nothing, went to the department manager to see what decision had been made. He told claimant the vice president had not mentioned the mattter to him. Believing she was only getting the "runaround," claimant submitted her resignation on June 27, 1979, giving the company 3 days' notice. A few hours after the resignation was submitted, claimant was offered a 50 cent per hour increase to stay. She refused the offer, informing the employer the issue was now a "matter of principle" and that she did not wish to go through the same trouble to get future raises.

Decision

The adjusted determination is *affirmed*. (Voluntarily quit without good cause. Benefits denied from July 20, 1979 until no longer unemployed.)

Reasons

The Kentucky Unemployment Law, KRS 341.370(2)(c), provides for the disqualification of a worker from receiving benefits for the duration of the period of unemployment when she voluntarily quits her most recent work without good cause. Good cause exists under conditions which would afford a prudent worker no reasonable alternative to forfeiture of his job.

Clearly, employment which demands that a worker compromise moral principles in exchange for continued employment or advancement is unsuitable work, and a worker who quits for such reasons does so with good cause. That this rule is inapplicable in the present case is evident for several reasons.

First, claimant herself concedes that the corporate officer was drunk when the offensive statements were made and that afterwards he avoided her, apparently out of embarassment. No similar demands had ever been made or intimated, nor were they ever repeated. When informed of what had happened, the corporate vice president indicated such conduct was not expected or approved of. Finally and most conclusively, despite claimant's contention that the proposition was the reason for her leaving, in fact she remained on the job for over 5 weeks before deciding to leave, and then only after her repeated requests for a raise were not acted upon. It is therefore concluded that she quit not because of sexual harassment, but simply because she was denied a raise.

It is well established by precedent commission decision that an employer has the right to set wage rates of its employees (so long as they are consistent with the requirements of minimum wage laws) and has at its discretion the granting of raises. It is not the function of this division to regulate wages. Claimant has not shown that the wage paid was substantially less than the prevailing wage in the community for similar work so as to render her employment unsuitable. The contrary is evident. Her dissatisfaction with the wage did not afford her good cause to abandon the job.

JESSE BOONE
Hearing Officer

Arkansas

COURT OF APPEALS

November 28, 1979

PRISCILLA KILGORE *v.* FALLS CHURCH ANIMAL HOSPITAL AND CHARLES DANIELS, DIRECTOR, STATE DEPARTMENT OF LABOR

Time:
Temporary

Voluntary leaving 450.55

Claimant, disqualified for quitting a permanent job for a temporary one, had followed her husband in August to Washington, D.C., where he planned to enroll in school. His term would end in May, when they would return to Little Rock, where employment was waiting for him. On arrival in Washington, claimant secured work with an animal hospital; she advised her employer of her termination in May as, with the school term ending, she would accompany her husband back to Little Rock. In January, however, she left the animal hospital for work as a receptionist with a Congressman. The job paid about 50 percent more than she was earning, enhanced her experience and future prospects, and would end in June. Claimant returned to Little Rock then, reentered the labor market, and filed for benefits. *Held,* reversed since effectively she had not left a *permanent* job for a temporary one. While her employment with the animal hospital was permanent in scope and range, it was actually temporary according to the work arrangement she had made with her employer. Thus, she left one temporary job for another, and did so for good cause.

GEORGE HOWARD, JR., Judge

The question presented is whether the finding of the agency, that appellant quit a permanent job for a temporary one, was not for good cause connected with the job and, hence, that appeallant was not entitled to unemployment benefits, is supported by substantial evidence.

Appellant, in August 1977, accompanied her husband to Washington, D.C., where he would be enrolled in school as a full-time student, during the 1977–78 school term. The term was scheduled to end officially in May 1978, at which time appellant and her husband were scheduled to return to Little Rock where appellant's husband would occupy a position of employment that was awaiting his return. At the time appellant left Little Rock for Washington, D.C., she was unemployed and receiving unemployment benefits.

Upon arriving in Washington, appellant promptly obtained employment at the Falls Church Animal Hospital in Falls Church, Va. Appellant advised her employer that her husband was attending school in Washington for the duration of the current term, and that she would have to terminate her status as an employee in May 1978, and return to Little Rock with her husband.

In January 1978, appellant left the job at the animal hospital and accepted employment as a receptionist with U.S. Representative Jim Guy Tucker in Washington, D.C. The new position afforded appellant a substantial salary increase, paying at least 50 percent more than what she was receiving at the animal hospital. The receptionist position was temporary, since it would terminate in the middle of June 1978.

In June 1978, appellant returned to Little Rock and entered the labor market immediately in search of employment.

READEX FICHE

On June 28, 1978, appellant filed her claim for unemployment benefits. Appellant advised the agency that she terminated her job at the animal hospital for the following reason:

> I was offered a higher paying job, also an offer of better experience for the future and more contacts for a job in Arkansas.

The agency concluded, in relying upon section 5(a) of Ark. Stat. Ann. section 81-1106 (Repl. 1976):

> You quit your permanent job with the above employer [Falls Church Animal Hospital] to accept a temporary position with Congressman Jim Guy Tucker's office. Although you may have had good personal reasons for quitting, you have not shown good cause connected with the work.

Section 5(a) provides:

> . . . an individual shall be disqualified for benefits:
>
> (a) If he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall continue until, subsequent to filing his claim, he has had at least 30 days of paid work.

Appellant was disqualified for benefits until she had at least 30 days of covered employment.

The holding of the agency was affirmed by the appeals tribunal, the board of review, and the Circuit Court of Pulaski County.

We are persuaded that the finding of the appellee that appellant quit "a permanent job" with Falls Church Animal Hospital to accept a "temporary position with Congressman Jim Guy Tucker's office," is not supported by substantial evidence and consequently, we *reverse*.

Appellant testified that when she made application for employment at Falls Church Animal Hospital, she advised management that she would be in the Washington, D.C., area for the duration of the 1977-78 school term which would end in May, 1978, and that she would return to Little Rock at that time with her husband. She stated that her employer recognized that she was only a temporary employee. This testimony has not been contradicted.

We have searched this record carefully in an effort to determine the basis of appellee's finding that appellant's employment with Falls Church Animal Hospital was "permanent." While it is clear that the position that the appellant occupied may be characterized as permanent in scope and range, the work arrangement between appellant and her employer was temporary in all respects. Appellant testified that the job offer from Congressman Tucker was temporary. The agency also found that the employment with Mr. Tucker was temporary in scope and range.

During oral argument, counsel for appellee conceded, in a hypothetical situation, that if appellant's employment with the animal hospital had been permanent and appellant quit the permanent position in order to accept another permanent position and later became unemployed, appellant would be eligible to receive benefits. In other words, if the position with Congressman Tucker had been characterized as permanent, under the agency's reasoning, appellant would have qualified for benefits because she left a permanent job in order to accept another permanent position.

While is is understandable, and, indeed, logical, why an employee who quits a permanent job in order to accept a temporary one is disentitled to benefits when the temporary employment ceases, we are not persuaded that the same disqualifying rule is applicable when an employee leaves a temporary assignment to accept another temporary position which affords more pay.

We perceive that the posture taken by appellee would impose a penalty on an employee who desires to transfer to another job in order to improve his financial position and would extend a premium to an employee who is satisfied with some degree of permanence in his employment status at less pay. We cannot visualize such a policy as being in harmony with the legislative purpose of the Employment Security Act as a means of protection against the hazards of economic life.

Appellee has cited *Harris* v. *Daniels, et al,* 263 Ark. 897, 567 S.W.2d 954 (1978) in support of its posture in this proceeding. *Harris* has no application here. In *Harris,* the claimant accepted what started out as a temporary job but ultimately became permanent, and claimant quit his job in order to look for other employment.

Accordingly, we *reverse* the Circuit Court of Pulsaski County with directions to enter an order reversing the agency.

Reversed and *remanded.*

*U.S. GOVERNMENT PRINTING OFFICE: 1980-281-400/4

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Report 329-1
June 1980

BENEFIT SERIES SERVICE UNEMPLOYMENT INSURANCE

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SPECIAL NOTICE

Your attention is called to the Report of Mr. Owen and Mr. Wood, "The Factor of Timeliness in Deciding Second Level Unemployment Insurance Appeals," prepared for the National Commission on Unemployment Compensation in June 1980.

(File in "Benefit Principles.")

NOTICE

The comments of Robert L. Smith, Appeals Referee of the Missouri agency, entitled *"Cross Examination (Scope of and by Lay Persons),"* made at a Referees' meeting in March 1980 should also be of interest.

(File in "Benefit Principles.")

CORRECTION

Please make the following cross-through correction in Report 327, December 1979: MC350.43-17, p. 59, the originating State should be *"South Dakota"*, not *"Montana"*.

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U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
Unemployment Insurance Service
Prepared by Division of Program Policies and Legislation
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THE FACTOR OF TIMELINESS IN DECIDING SECOND LEVEL UNEMPLOYMENT INSURANCE APPEALS: A REPORT PREPARED FOR THE NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION

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PART I
THE CURRENT STATE OF THE PROBLEM

Introduction

This report is based on a review of the second level appeal process in state unemployment insurance systems, with particular concern for the factor of timeliness in the disposition of appeals on contested unemployment insurance claims.

Most unemployment insurance claims are filed in local offices of a state's unemployment insurance agency. The agency's claims taking and claims adjustment staff, by informal inquiry and investigation, obtains information necessary to apply the eligibility and disqualification provisions, and notify interested parties, usually the claimant and former employers, of the result.

A claimant whose claim is denied is entitled to a hearing under state law provisions passed to comply with this language relating to Title III funding in the Social Security Act:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for
> 1. Such methods of administration . . . as are found to be reasonably calculated to insure full payment of unemployment compensation *when due*; and . . .
> 3. Opportunity for a *fair hearing*, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . 42 U.S.C. section 503 (a)(1) and (3). (Emphasis added.)

Although derived from authority other than the Social Security Act, other interested parties may also obtain a hearing on a claim. "Fair hearing" at this level is considered to require certain procedural safeguards. A written or electronic recording of the evidence, usually on a cassette tape, is made and preserved for further review if necessary.

There is no requirement in the Social Security Act for any further administrative adjudication, and in Nebraska, New Hampshire and Hawaii no further administrative process is provided. In all other states, claimants or other interested parties may have further opportunity for review at a higher administrative level. Because this procedure is not mandated by the Social Security Act, Federal interest in the specific procedures at the second level of appeals has been principally to insure that they do not vitiate the fair hearing afforded at the first level.

States have adopted a variety of names and titles applied at these two levels of appeal and to their staff. Appeals Referee, Appeals Examiner, Hearings Officer and Administrative Law Judge are some of the various titles of staff in different states who perform essentially the same function in conducting hearings and making decisions at the first appeal level. The review of decisions at the second level is done in different states by an Appeal Board, Board of Review, Industrial Commission, Employment Commission, or other similar body. For the purpose of this report, except when a specific state's organization is being discussed, the terms "first level" or "lower level" appeal and "second level" or "higher level" appeal will be used. It is recognized that in some states there is authority for direct referral of a case to the second appeal level for the initial hearing or for the second level, on its own motions to take initial jurisdiction in a case. In actual practice, this authority is not invoked to the extent of significance in day to day operation and should not make the simplified designation confusing.

Background

The Social Security Act provision for methods of administration calculated to pay unemployment compensation *when due* was recognized from the beginning of the unemployment insurance program as a requirement for processing of claims as quickly as possible. Early day laws providing for sometimes lengthy waiting periods to provide time for processing claims were shortened or eliminated as states developed effective mass accounting systems, exploiting effectively the newly developing mechanized accounting and information systems. Innovation and change, often involving legislative changes, marked the continuing development of systems so efficient in the prompt processing of cyclical payments that they have often been utilized by a variety of other programs.

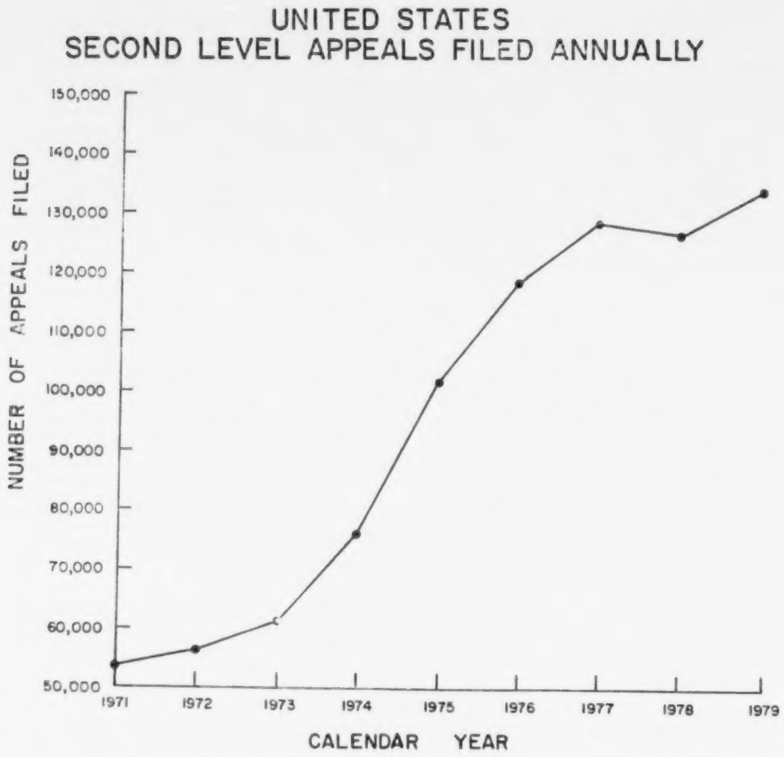
With a few exceptions, appeals operations at both the first and second levels were not typified by innovation, experiment, or change for many years. The "when due" language in the Social Security Act apparently was considered by many to apply only to claims processing by the state's unemployment insurance agency; and that once in the appeals process, benefits again became due only after a favorable decision was issued, without regard to time required for processing the appeal. Goals set by various states were not uniform. Statistics were collected reflecting the number of appeal decisions made at various periods of time, but states with records of long processing time often explained that local differences in law or practices were responsible, and the records of timeliness in general, did not improve.

The one factor common to all second levels is a dramatic increase of case load. However, many states are currently processing appeals in the same basic manner established at the inception of the program. In 1941 there were 11,493 second level appeals filed in the United States. In 1979 there were 135,005 appeals. The following chart shows the national case load increase in recent year.

This phenomenal increase in case load places a heavy burden upon the system. It is probably the primary factor which has led to concern about the timely processing of appeals, a concern shared by the courts.

Judicial Scrutiny of Timeliness

Prior to the 1970s the question of appeal timeliness was not presented to the courts, at least no reported cases were found in which the question was considered. Then, in 1971, the United States Supreme Court issued what has become known as the landmark case in this area, *California Dept. of*



Human Resources Development v. *Java* , 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed. 2d 666 (1971). The *Java* case is best known for what it did not say rather than for what it did say. California had a rather detailed procedure for initial determination by the local office. Once a determination of eligibility was made the parties had normal appeal rights. California, like a few other states at that time, had a specific statutory provision requiring that benefits to a claimant who had been found eligible be withheld during the period of an employer appeal. In California, at the time of *Java*, the length of an employer appeal averaged around seven weeks. The state's withholding of benefits to individuals who had been determined eligible was challenged on the grounds that it violated procedural due process under the 14th Amendment to the Constitution and that it was improper under the Social Security Act, 42 U.S.C. section 503(a)(1), which provides in part that unemployment compensation benefits should be paid "when due." Although much post *Java* discussion centered on due process, that issue was not addressed by the Court because the Court found that the Social Security Act resolved the problem. At page 133 of the decision the Court stated:

> We conclude that the word "due" in section 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective position; any other construction would fail to meet the objective of early substitute compensation during unemployment . . . .

The issue of how long an appeal took was never presented to the Court or considered by the Court, although statistical measures were noted in the opinion. All that the *Java* case directly holds is that once an individual has been determined eligible for benefits those benefits may not be withheld pending appeal by an employer.

Regardless of the limited nature of the direct holding in *Java*, the case fostered much discussion and concern about the timeliness of decisions on appeal, primarily first level appeals. The Department of Labor caused an intensive survey to be made regarding the timeliness of appeals at the first level. The survey was completed in July of 1972, and concluded that a federal timeliness standard for first level appeals was in order. In August of 1972, a standard for appeals promptness was effectuated in 20 C.F.R. section 650. One of the introductory statements to the standard indicates that the Social Security Act, primarily the "when due" provision, requires states, when deciding appeals, to decide the administrative benefit appeals:

> . . . with the greatest promptness that is administratively feasible. What is the greatest promptness that is administratively feasible in an individual case depends upon the facts and circumstances of that case. For example, the greatest promptness that is administratively feasible will be longer in cases that involve interstate appeals, complex issues of fact or law, reasonable request by parties for continuances or rescheduling of hearings or other unforseen and uncontrollable factors than it will be for other cases . . . . 20 C.F.R. section 650.1(b).

The standard, as currently in effect, requires lower levels to issue 60% of their decisions within 30 days and 80% within 45 days. Failure to comply may result in a finding that the state is out of compliance with federal requirements so as to justify withholding all administrative funding from the state.

Regardless of what it did not say, *Java* had an obvious practical impact on appeals promptness. However, in 1975 the United States Supreme Court issued the case which will probably prove to be the true cornerstone of judicial analysis of appeals promptness. While *Java* held that a favorable determination caused benefits to be "due," in *Fusari* v. *Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed. 2d 521 (1975), the Court ruled that, "(t)he basic thrust of the statutory 'when due' requirement is timeliness." *Id*, at 388–89. *Fusari* involved a direct challenge of the Connecticut appeals system. At the time of the original suit Connecticut provided only one level of review, and a representative appeal was found to average 126 days to process. A three judge federal court found that the system denied due process. While the case was being appealed to the United States Supreme Court, Connecticut changed its statutory structure to provide a two tier system similar to many other states. The Court declined to decide the case or review the changed Connecticut system, vacated the decision, and remanded the case for reconsideration of the changed system by the lower court. The Supreme Court noted that there was no bar to deciding the case under the Social Security Act and indicated that only after a finding of satisfaction of the federal statute would an analysis of due process be in order. In relation to procedural due process the Court stated that, "the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." *Id*, at 389. In choosing not to review the case, the Court, for the first time, indicated that the speed of administrative review could affect not only a "when due" determination under the Social Security Act but also whether or not the system granted parties procedural due process under the 14th Amendment.

The case of *White* v. *Mathews*, 559 F.2d 852 (2d.Cir. 1977), while not involving unemployment insurance, provides a direct analogy. In *White* slow administrative adjudications in the Social Security Disability Insurance program were attacked. The Second Circuit Court of Appeals, relying on a statutory requirement of a "hearing," found that unreasonable delays were inconsistent with the idea of a hearing and therefore granted relief. The finding was made in spite of the open recognition that the agency was making diligent efforts to meet the problem but was simply unable to keep up with the case load.

While *Java* did not deal with appeals promptness, and while *Fusari* was directed primarily at the first appellate level, the Federal courts have considered promptness by second level authorities. In *Neal* v. *Ashler*, Civ. TCA 78-0826 (N.D. Fla. Feb. 20, 1979) (unpublished) the Federal court was asked to consider the Florida second level system which was claimed to improperly deny appellants prompt adjudication. The final decree in the case was a Consent Judgment wherein the second level agreed to a continuing standard requiring 80% disposition within 60 days and 95% disposition within 90 days. The consent decree specified that there was no finding of any violation of any state or federal law. The final consent decree is not nearly as informative as a temporary order issued in the case on September 22, 1978, which made an indepth analysis and findings relative to the asserted problem.

While Florida, like other states, had experienced a continuing upswing in appeals, the situation there has been somewhat unusual. Florida's record of second level appeals filed, disposed of, and the percentage of disposed of in specified periods of time for recent years is summarized below:

Year	*Appeals filed*	*Decisions*	*Within 30 days*	*Within 45 days*	*Within 75 days*
1971	1116	985	09.5	24.6	71.2
1972	1008	970	03.0	12.3	55.1
1973	1082	1038	01.1	03.7	15.4
1974	1612	1464	04.4	10.5	24.7
1975	5041	2993	03.2	13.2	36.5
1976	5440	5255	00.0	01.3	04.0
1977	5020	4970	00.0	04.6	21.4
1978	4207	6559	00.2	03.3	15.3
1979	3497	3509	04.3	37.9	66.5

The second level authority was obviously inundated with an unprecedented work load when the number of appeals increased from 1,612 to 5,041 between 1974 and 1975. The flood of claims, however, was not the beginning of the problem of timeliness. In 1973, prior to the deluge of appeals, only about 15% were decided within 75 days. The full impact occurred when in 1975 the appeals received exceeded decisions made by 40%

and in 1976, 96% of the decisions required more than 75 days, many substantially longer.

It was this situation that confronted the court in *Neal*. The court found that the second level was taking between 100 and 120 days to dispose of an appeal while in 1975 the average appeal was disposed of in 60 days. In the temporary order, the court found that "when due" under the Social Security Act, as applied to administrative appeals, meant as soon as "administratively feasible," using the language of *Java*. After making this finding, the court found no need to address the constitutional questions raised by the plaintiffs. In its temporary order the court mandated that 80% of all appeals should eventually be disposed of within 60 days. Citing *White*, *supra*, the court was unsympathetic to claims of funding and personnel shortage. Because of the nature of the final decree in the case, *Neal* is not necessarily legal authority for future court action. See also, *Wilkinson* v. *Abrahams*, Civ. 76-1932 (E.D. Pa. April 28, 1977) (unpublished). The 1979 figures, shown above, indicate that Florida has responded well to the *Neal* case.

There is no question but that courts can and will evaluate second level appeal promptness. Futher, legal aid and legal assistance groups have evidenced concern with administration in other second level areas. In New York and New Jersey, court actions have been filed in these areas.

While the federal promptness standard does not apply to second level appeals, the Secretary's interpretation of federal law does. See, 20 C.F.R. section 650.1(d). That interpretation is specified in section 650.3 (a) of the Standard as follows:

> (a) The Secretary interprets sections 303(a)(1) and 303(a)(3) [the "fair hearing" and "when due" portions of the Social Security Act] above to require that a State law include provision for—
> (1) Hearing and decision for claimants who are parties to an appeal from a benefit determination to an administrative tribunal with the greatest promptness that is administratively feasible, and
> (2) Such methods of administration of the appeals process as will reasonably assure hearing and decision with the greatest promptness that is administratively feasible.

The *Neal* case noted these provisions in its temporary order. They clearly provide authority for further judicial scrutiny of second level appeals promptness. However, it is noted that fear of a law suit should not be what prompts changes for more timely decisions. Law suits are filed and won because of an underlying inequity. If inequities exist, that fact should be the motivating reason for change.

This discussion was not intended as an exhaustive legal memorandum or brief. It has touched upon some of the highlights in the area. While arguments contra to the rationale underlying each of the cases cited may be made, particularly as applied at second levels, there is no denying that a judicial trend is underway and that second level authorities must be prepared to face judicial scrutiny of their operations.

The States' Response

Although these events might have portended universal concern with the lengthy periods of time required for many second level appeal decisions, some second level organizations apparently have not attempted or achieved much improvement in their record of timeliness. Accomplishment varied among states, but in 1979 there were fourteen states where more than 40%

of the second level appeal decisions were made more than 75 days after they were filed, many long after 75 days. Five states required more than 75 days for more than 75% of their decisions. In three states, less than 10% of the second level appeals were decided within 75 days.

For the entire nation the following table indicates the percentage of cases disposed of within specific time periods during recent years.

Year	*Decided in 30 days*	*Decided in 45 days*	*Decided in 75 days*
1971	21.1	42.1	68.0
1972	20.0	40.1	64.9
1973	19.8	39.0	64.6
1974	18.2	37.4	59.6
1975	15.2	32.9	60.0
1976	15.7	27.9	53.8
1977	16.1	29.4	59.0
1978	15.9	31.4	57.4
1979	17.8	35.7	61.4

National totals conceal the comparatively good performance of some states which are offset by others where timeliness has never been a high priority.

Cases Pending and Backlog

It is commonly stated that the reason for an increasing case load's adverse impact on timeliness is the naturally flowing backlog of cases which prevents a second level from promptly giving attention to a new appeal. This belief is felt to be symptomatic and simplistic. It is symptomatic because any existing backlog is not truly the problem, it is merely evidence of the problem. Further, it is simplistic because the size and extent of a backlog is not only difficult to truly ascertain but extremely difficult to analyze. Any actual backlog analysis must be done on a state by state basis dealing with that state's many variable factors. However, some general observations are in order.

The fact that a state has a relatively large number of cases pending before it does not mean that it has a backlog. A second level authority in absolute equilibrium with a single routine procedure for processing cases should have pending before it, at any given time, the number of cases that it will receive during the time period necessary to decide the average appeal. Thus, if a second level authority averages 45 days to decide an appeal and receives 200 appeals per month it should have 300 cases pending at any given time. This allows maximum consideration and treatment for each case yet provides immediate processing for all incoming appeals.

Unfortunately, the above analysis works only in theory. Second level authorities do not have standard processing procedures for all cases. Jurisdictional-type issues are normally treated summarily. Difficult legal questions often have their own procedural routing, and there may be various other routing procedures for the routine cases that make up the bulk of a second level authorities' work. Further, appeal rates and disposition rates are not constant.

Although the number of cases pending will not lend itself to instant analysis to determine the size or extent of a backlog, a large number of cases pending relative to appeal activity certainly points to a problem. Moreover, relative comparisons of cases pending over periods of time may show trends. Individual states' figures vary to such an extent that enumeration would not be helpful in relation to an overall understanding. However, national figures for recent years, as set out below, provides some insight.

Year	*End of month average of pending cases*	*Single claimant appeals filed during year*
1971	9,777	53,295
1972	10,043	56,301
1973	12,053	62,212
1974	17,434	77,187
1975	21,878	102,629
1976	39,278	119,656
1977	31,176	129,627
1978	30,584	127,432
1979	31,180	135,005

The number of single claimant appeals filed annually is listed to give perspective to the increase in the cases pending. As indicated, the normal number of cases pending at any given time will vary directly with the overall number of appeals being filed. While it is not necessarily true that there will be a direct relationship between the change, it is noted that during the period set out, total appeals increased by 253%, while the number of cases pending increased by 319%.

In 1979 all second levels received 135,005 appeals and issued 137,194 decisions, thereby reducing the number of cases pending nationally by 2,189. On January 1, 1980, there were 28,888 second level appeals pending in the United States. Using 1979's production rate, all second levels had a monthly average disposition rate of 11,433 cases. At first glance it might appear that the states have a built in production lag of 2.5 months, i.e., the amount of time necessary to work through the current cases pending. If such were the case it would be easy to conclude that a large backlog exists. However, as noted before such a conclusion must rest on many invalid assumptions. First, not all cases are processed on a first in, first out basis. Many of the pending cases are very likely cases which have been pending for a considerable period of time and do not adequately reflect the average work flow. Most important is the fact that not all of those cases were filed on January 1, 1980. The cases pending are in various stages of processing so as to defy any simplistic analysis. As indicated, any valid analysis would require sophisticated and detailed sampling on a state by state basis. In fact, such an analysis would be best suited to a computerized approach.

Moreover, a backlog of cases to be decided, while often cited as the problem facing second level authorities, is merely a symptom of the real underlying problems. It is the structure of the second level authorities and their methods of operations which allow backlogs to exist and increase. Solving problems in these areas will cause backlogs to be eliminated naturally. The most that may be concluded herein is that at some hard to define point the number of cases pending goes beyond a normal level and creates a backlog which delays the normal processing of cases. While variance among the states is marked, it may be observed that nationally the number of cases pending is consistently increasing and at a rate slightly greater than the increase in overall appeals.

Structure of the Review

These are the circumstances that have led to consideration of whether or not the second level appeal authority can function only at the current slower pace, or if it, like the decision making processes at the preceeding levels of unemployment insurance adjudication, can be improved and changed to perform at timeliness levels more consistent with the program purposes.

The primary considerations of this review are:

1. Is it feasible to establish a Federal standard for the second level appeal function specifically identifying the periods of time for disposition of appeals that would be necessary for the compliance with the Federal Law?
2. If such a standard is feasible, what specific measure of time requirement may be reasonably applied to the function?
3. What are some of the particular areas within the states which could be altered to increase timeliness?

This report is based on a review including: (a) on site observation of second level appeals operation in nine states, (b) interviews with members of the second level authority in the reviewed and other states, and with the operating staff members of these organizations, (c) interviews with appeals staff of the Unemployment Insurance Service in the Federal Department of Labor, (d) review of completed second level appeal decisions, (e) review of current and historical statistical records of second level appeals performance.

After briefly considering some of the findings from the states surveyed, this report will proceed first to the development of a proposed standard and then to a consideration of some operational areas which present barriers to promptness in some states.

PART II
THE STATES SURVEYED

In preparing this report, on-site examination of the second level systems was made in the following states.

FLORIDA
ILLINOIS
MINNESOTA
MISSOURI
NEW JERSEY
NEW YORK
RHODE ISLAND
UTAH
WASHINGTON

It is noted that while the sample states represent a cross-section by size of operation, form of organization, and geographic location, they were not selected by any sampling methods so as to achieve any statistical validity in an examination result. What was sought was a diverse group of states that could give insight into the overall operations of second level systems.

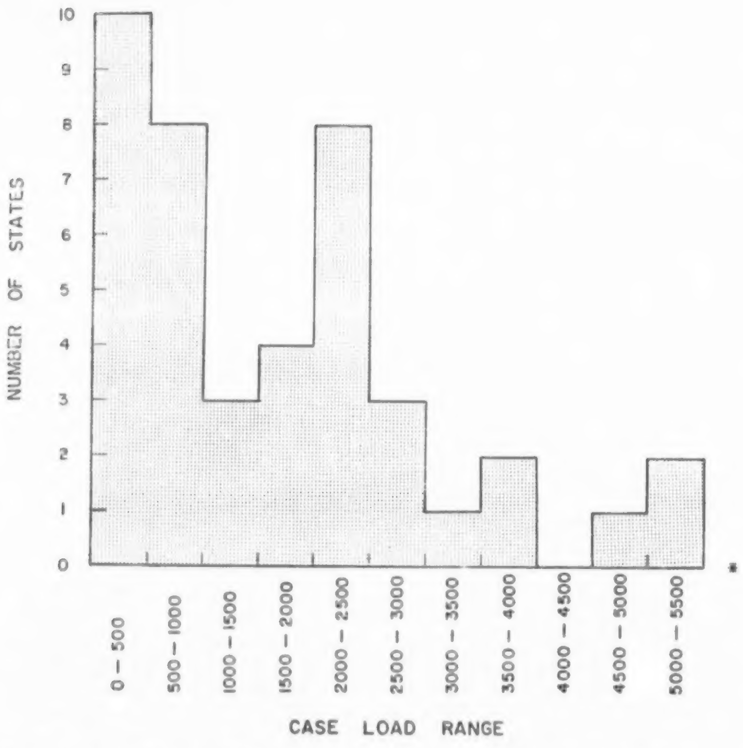
Further, the project did not allow for true statistical sampling within the various states. The statistical information derived from the sampling done, except for those national figures set out below, is not purported to be valid within any level of standard deviations. It is submitted that the basic figures are reliable if used for macroanalysis and not for a detailed evaluation. In other words, much of the information obtained from the sample states, including many of the figures, is subjective in nature and not subject to precise mathematical delineation.

Because of the subjective nature of the analysis of the systems, inclusion of the summaries of the various state organizations in the body of this report would add little for the reader. For this reason, the bulk of the analysis of the various states is attached as an appendix to this report. However, some general information and statistical tables are included herein, as they give a summary analysis of what nine diverse states have been doing in relation to processing increasing case loads. The form and method of their operations is contained in the appendix.

The sampled states ranged in case load size from Utah which received 245 single claimant appeals in 1979 to New York which received 15, 617 single claimant appeals in 1979. The second level organizational form varied from states which had a three person Board of Review, one representing labor, one representing industry and one representing the people, to situations wherein the head of the agency is personally designated as the second level appellate body, and that person has by administrative fiat established a full staff of case reviewers. Case review ranges from states wherein each member personally reviews the typed transcript of each hearing before the lower level to states wherein law clerks prepare a synopsis of the record for review by an individual member of the second level authority. Some second levels provide for no input from the parties at the second level, some grant formal hearings before the full second level authority in many of the cases, and one second level grants full formal hearings only for the purpose of argument and explanation in each of its cases. Most of the states use a "form" decision in many of their cases. In some states the members of the second level authority draft their own opinions while in others law clerks or staff attorneys draft the actual opinions. In some states certain functions are combined in first and second level operations and sometimes personnel are loaned from one level to the other during peak load periods. Other variations exist, but it is felt that the above points out the true diversity that exists. Regardless of whether this diversity is caused by statutory requirements, administrative rulings or inertia, it does create a situation where valid cross comparison is not truly practical on a statistical basis.

However, work load and decision promptness can be statistically measured. What follows is, first, a chart showing the number of states falling within various sizes of case loads according to their 1979 appeals. This includes all second level authorities, not just those sampled. Thereafter appear statistical summaries, nationally and for the sample states, for the years 1971 through 1979. While these figures should be considered in relation to the overall second level organization that they come from, they were felt to be initially informative and instructive as to the overall problem so as to be more valuable in this portion of the report than in the appendix relating to the various states. It is suggested that an analysis of the summary be made along with detailed analysis of the statistics shown on the following pages.

STATE DISPERSION BY VOLUME OF SECOND LEVEL APPEALS FILED IN 1979



* NOT SHOWN ARE 4 STATES RECEIVING 8,249; 12,971; 13,372; & 15,617 APPEALS.

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Higher Authority
Statistical Summary

Receipts and Dispositions					Time Lapse: Percent of Decisions Made Within—		
Year	Appeals filed	Disposed of	Percent decided in favor of appellant	Pending at end of year	30 days	45 days	75 days
			Unites States				
1971	53,295	50,617	14.8	10,024	21.1	42.1	68.0
1972	56,301	53,877	15.3	10,629	20.1	40.1	64.9
1973	62,212	58,207	16.2	13,314	19.8	39.0	64.6
1974	77,187	68,039	16.4	17,121	18.2	37.4	59.6
1975	102,629	89,997	15.4	25,804	15.2	32.9	60.0
1976	119,656	104,461	14.9	29,972	15.7	27.9	53.8
1977	129,627	126,957	14.3	31,173	16.1	29.4	59.0
1978	127,432	123,245	13.9	32,947	15.9	31.4	57.4
1979	135,005	137,194	—	28,888	17.8	35.7	61.4
			Florida				
1971	1,116	985	7.6	221	9.5	24.6	71.2
1972	1,008	970	10.1	259	3.0	12.3	55.1
1973	1,082	1,038	9.2	304	1.1	3.7	15.4
1974	1,612	1,464	22.9	452	4.4	10.5	24.7
1975	5,041	2,993	15.9	2,499	3.2	13.2	36.5
1976	5,440	5,225	23.0	2,684	0.0	1.3	4.0
1977	5,020	4,970	22.4	2,982	0.0	4.6	21.4
1978	4,207	6,559	16.2	630	0.2	3.3	15.3
1979	3,497	3,509	—	582	4.3	37.9	66.5
			Illinois				
1971	5,233	4,462	35.7	1,849	2.8	14.4	22.9
1972	6,159	4,985	38.3	1,953	0.7	3.7	13.1
1973	6,224	5,309	36.5	2,810	1.8	5.7	17.6
1974	9,708	8,021	38.6	2,781	0.1	0.4	6.4
1975	9,273	9,390	40.4	1,539	3.0	11.4	43.6
1976	7,492	6,806	28.9	1,114	10.7	30.4	60.2
1977	6,391	5,515	29.0	1,703	14.1	30.0	54.2
1978	9,882	6,977	33.4	3,068	10.5	20.2	33.6
1979	12,971	10,735	—	3,381	6.0	11.5	28.6
			Minnesota				
1971	478	385	15.0	232	6.9	8.2	13.4
1972	839	789	13.5	266	0.9	1.5	8.7
1973	1,068	808	10.0	377	0.2	0.5	6.1
1974	1,018	845	10.9	526	4.5	6.3	9.9
1975	1,249	1,176	11.0	518	3.5	4.8	5.5
1976	1,440	1,224	9.8	527	1.5	5.0	13.7
1977	1,528	1,352	8.3	502	6.9	13.6	24.2
1978	2,770	1,900	6.7	811	5.2	11.5	27.0
1979	2,079	2,480	—	340	4.4	8.3	19.7

Prepared by Employment and Training Administration

Receipts and Dispositions					Time Lapse: Percent of Decisions Made Within—		
Year	Appeals filed	Disposed of	Percent decided in favor of appellant	Pending at end of year	30 days	45 days	75 days
			Missouri				
1971	1,579	1,324	5.4	405	4.1	14.7	40.7
1972	1,345	1,075	4.3	279	11.8	36.9	70.9
1973	1,114	1,107	5.4	166	5.3	21.1	59.0
1974	5,132	1,186	2.3	430	6.6	16.1	38.2
1975	3,840	1,872	2.9	970	1.8	12.4	26.3
1976	3,762	2,561	2.9	955	1.2	11.4	35.7
1977	3,455	2,299	4.3	1,439	4.5	10.8	67.2
1978	2,816	2,727	5.1	615	1.8	12.3	66.5
1979	3,378	2,680	—	758	7.2	29.9	35.4
			New York				
1971	7,500	7,332	5.4	1,083	12.3	37.3	76.8
1972	8,863	8,566	8.7	1,266	15.3	40.1	70.4
1973	9,999	9,557	6.9	1,596	15.4	43.0	72.3
1974	11,884	11,560	9.6	1,842	19.3	51.8	78.1
1975	14,775	13,954	7.4	2,572	11.6	42.4	74.9
1976	16,998	15,836	11.4	3,616	3.8	15.6	58.4
1977	19,926	20,247	15.6	3,187	3.3	19.4	72.1
1978	17,670	16,889	10.6	3,891	4.3	29.3	68.0
1979	15,617	16,762	—	2,557	5.9	25.4	61.2
			New Jersey				
1971	1,116	985	15.6	441	12.0	59.4	84.7
1972	1,008	970	13.8	731	13.7	52.3	83.4
1973	1,082	1,038	8.8	401	14.0	32.6	69.1
1974	1,612	1,464	6.1	879	23.3	59.4	88.5
1975	5,041	2,993	4.8	402	21.4	40.9	78.0
1976	5,440	5,255	5.8	461	9.5	29.3	76.0
1977	5,020	4,970	5.5	387	9.8	36.5	45.5
1978	4,207	5,669	9.3	490	28.4	51.2	41.2
1979	5,390	5,680	—	441	36.8	60.0	79.4
			Rhode Island				
1971	258	266	26.6	24	21.0	49.8	96.3
1972	356	337	22.1	43	7.1	33.6	97.4
1973	232	241	28.4	28	8.1	41.9	76.0
1974	313	276	20.7	34	6.0	34.9	61.7
1975	503	466	16.1	108	3.1	19.2	71.0
1976	520	457	14.3	171	0.7	7.2	78.3
1977	609	592	15.3	188	2.3	14.6	76.5
1978	631	505	15.7	314	0.8	17.5	8.4
1979	502	681	—	225	0.9	18.5	85.5

Receipts and Dispositions					Time Lapse: Percent of Decisions Made Within—		
Year	Appeals filed	Disposed of	Percent decided in favor of appellant	Pending at end of year	30 days	45 days	75 days
			Utah				
1971	54	52	28.3	8	20.8	64.2	96.3
1972	118	117	27.4	9	8.5	38.4	97.4
1973	81	72	21.6	18	4.1	15.0	76.0
1974	121	120	20.0	19	8.3	17.5	61.7
1975	149	159	13.0	19	4.8	11.6	71.0
1976	191	155	10.3	55	2.6	12.9	78.3
1977	274	298	11.8	31	9.1	18.8	75.5
1978	216	220	13.6	27	16.4	61.9	97.8
1979	245	206	—	66	9.7	33.4	90.4
			Washington				
1971	814	668	8.9	163	36.4	61.8	89.3
1972	1,106	946	5.6	320	15.8	16.3	38.9
1973	1,169	1,286	9.2	142	16.7	18.4	52.7
1974	1,433	1,403	7.3	172	27.0	31.4	68.8
1975	1,543	1,175	8.1	540	19.0	24.5	33.6
1976	1,967	2,008	14.2	499	4.5	9.5	16.9
1977	2,104	2,170	12.8	437	7.8	17.9	30.4
1978	2,174	2,156	18.2	455	6.6	15.3	45.5
1979	2,588	2,637	—	407	11.5	32.5	55.3

As noted, a more detailed explanation of the organization and operation of the sample states is contained in the appendix. At this point it is sufficient to state that the systems do vary greatly and, as a rule, are not particularly prompt in processing cases.

PART III
CONSIDERATION OF A STANDARD

How May Timeliness Be Measured?

Before a time standard may be considered, it must be determined how much time is unreasonable for a higher level to take to decide a case. If it were determined that the slowest state was not taking too long to decide its cases then a time standard would not be in order.

Comparing higher levels to the adjudicative forums that they lie between provides little help in resolving this question because these forums vary substantially in form and procedure from the higher levels. The first level is primarily an administrative trial court. It is normally composed of one referee who travels to the claimant's location, conducts a brief hearing, and quickly thereafter issues a decision. The lower level has no prior record to consolidate and prepare. It receives substantially all of the evidence upon which its decision will be based at one brief hearing. Particularly significant is the fact that only one individual is required to make the necessary findings of fact and conclusions of law in the decision. The decision is not the joint effort of several individuals who must each review the record and then agree in the result. This marked difference between the two levels does not support a conclusion that what is normal timeliness at the lower level should be automatically applied to the higher level.

Neither is the higher level comparable to the court systems. While the states inject an appeal from their higher level into varying levels of their court system it would not be fair to conclude that the court's average rate of processing such an appeal should be applied as a time standard to the higher level. Trial courts uniformly have clogged dockets and problems in processing. Further, the pleading stage may not be completed for several months. When an appeal is finally properly before the trial court, a harried trial judge is hard-pressed to find the time to review the complete record in addition to pleadings and briefs. For these reasons, which are peculiar to the courts, a trial court's decision may not be issued for many months. There is no logical reason to apply this standard to the higher authority. The problem becomes more pronounced at the high court level. Suffice it to say that if a state Supreme Court's rate of processing of these appeals was used to develop a standard for higher authorities, it might be found that two to three years might not be an excessive time period. Timeliness should not be determined by external comparison.

The Second Level Function Is To Decide Cases

Even the second level's role of providing guidance and precedent involves deciding cases. Therefore, the steps necessary for case decision will be treated generally here. It is noted that problems peculiar to difficult precedent-type decisions are treated specifically by a percentage exemption from the overall standard, explained *infra*. As noted previously, the actual steps taken to process a case may vary greatly from state to state. Even so, certain steps will be uniformly taken in regard to the processing of a routine case. They include receipt of the appeal, notice to the parties, compilation of the record, receipt from the parties of further input, analysis by the decision maker and preparing and distributing the decision. This general breakdown excepts two other particular types of appeals. First is the appeal that raises jurisdictional questions, such as being untimely to the second level. These appeals are normally summarily decided and processed. Second is the appeal wherein the second level grants a formal evidentiary hearing to the parties. These appeals are normally lengthy with delays due to continuances and other scheduling problems. However, the majority of appeals fit the form outlined.

Receipt of the appeal may consume from two to ten days depending on a state's statute and processing procedure. If an appeal is filed when mailed by an appellant or when presented to the agency, this time is consumed by the mails and the agency in forwarding the appeals to the second level authority.

Compiling the record may vary greatly in time depending on how it is done and may somewhat overlap other of the steps. The documentary information must be transmitted from the first level to the second level, and the record of the first level hearing must be prepared. The cassette recording of the hearing is normally transcribed by either the second level, the first level, or an outside contractor. While the documentary compilation should be made in from one day to one week, the preparation of the transcript may take as long as several weeks depending upon who is required to prepare it and the extent of their backlog. The time for preparation of the transcript can be reduced greatly if the cassette recording itself is used, either singly or by electronically producing duplicate tapes. It is probably fair to say that one to two weeks will be consumed by a compilation of record. Notification to parties adds no additional time requirements because it may be accomplished during the same time that the record is being compiled.

Further input from the parties will add another ten days to two weeks to the process. Assuming that the parties are allowed to review the transcript or recording of the prior hearing before making such input, usually in the form of a letter but sometimes as a legal brief, this time period will not begin until the compilation of record is completed. Included in this time period are necessary periods to transmit the transcript and receive whatever input is contemplated by the parties.

After all of the information is before the second level in a case it must then go to the decision maker. This may be the full authority or a single member. At this stage all of the information is reviewed, a tentative conclusion reached, confirmation of the decision made, and the formal decision prepared. The decision may be made at a periodic conference by the entire second level authority after an individual review has been made. The decision may be made after a law clerk reviews the case, produces a synopsis of it along with a proposed decision, and the second level authority then acts upon the synopsis and proposal. Other systems are possible and are used, but normally consist of a variation of these. One to two weeks will be consumed by the process.

After a decision has been made it must be produced for publication and mailed to the necessary parties. This step is purely clerical and should take from between two days to one week.

By adding the minimum ranges in the successive steps listed above, an appeal should be processed by the second level authority from within 28 to 59 days. It is noted that these time periods are not intended to represent either an ideal or an average time frame for the processing of an appeal. They would not fit a situation with a normal continuing input of appeals or a static situation where each step was processed without delay due to backlog. Further, they deal only with routine cases. The point of this analysis is to provide a general idea of what type of framework a second level may operate within. It further indicates that second level authority time frames may not be fairly compared to either first level authorities or courts.

Feasibility of a Standard

The time required for disposition of second level appeal varies widely among the states. It is difficult, also, to separate the factors of timeliness and quality. The scope of this review was not broad enough to consider varying degrees of quality. At this point, delay in the disposition of appeals is the one specific factor clearly identified as raising problems in relation to the "fair hearing," "when due" and "due process" requirements. Some states, both small and large, dispose of a large percentage of their decisions in relatively short time. It is assumed that essential fairness of the process and timeliness are not inconsistent.

Some of the statistics reflecting poor time lapse were included earlier in this report. Increasing work load is an explanation often advanced as the reason for delayed decisions. It may be significant, however, that in 1973, when the appeals work load was less than half of the 1979 work load, eighteen states did not make 60% of their second level appeal decisions within 75 days. Ten of these were in this same category in 1979. This leads to speculation that in some states the delay of decisions is ingrained in the system and persists without concern that it is a problem and without attention to improvement.

In general, the pattern of efficiency in timely disposition of appeals has not changed significantly in recent years regardless of work load. For the most part states that had good records of timeliness in 1979 also had good records through the various years of the 1970's. Of the fourteen states that did not make 60% of their decisions within 75 days in 1979, three had not done so for any of the previous nine years. Three states had not for seven, and three had not for eight of the previous nine years. The net result is that in 1979 a new record high for the nation of 52,194 second level appeals was delayed beyond 75 days.

From the historical record it does not appear likely that this record will change without specific and intensive effort to improve it. Obviously, instead of a standard, it would have been more desirable had all states established goals and achieved records of timeliness more consistent with the program purposes. Some states have done this. Others have performed well in some periods and poorly in others. Some have consistently performed slowly. A standard for timeliness would establish a common goal for all states.

A standard would acknowledge that there is concern for the problem within the program and perhaps forestall efforts to control the activity from outside the program. If there are, in some states, procedural, organizational, or review methods that prevent timely decisions, the existence of a standard may provide the necessary inducement to effect change. For these reasons it is the conclusion of this review that a Federal standard should be established, specifying the level of timeliness in disposing of second level appeals that is required for determining that a state law is in compliance with the Social Security Act.

Determining an Appropriate Standard

Consideration of a standard for this activity is complicated by the wide variation in the performance of states. A standard should be reasonably achievable by all states but sufficiently demanding to insure adequate performance. A standard set so low as to be easily achievable by states that now make great numbers of their decisions after 75 days would not be effective. The standard should not be substantially lower than the record of timeliness being achieved by a number of states.

The statistical reporting system that has been in place for a number of years measures the time performance of both first level and second level appeals at the same points, i.e., the number of decisions issued within 30 days, 31 to 45 days, 46 to 75 days, and more than 75 days. No evidence was found which would indicate that other periods of measure would be beneficial. However, after a standard has been in effect for some time, review of the statistical measures would be in order.

From a review of the time required for various elements in the processing of second level appeals it appears that the great majority of decisions completed within thirty days involve dismissals or decisions on such matters as jurisdiction, nonappearances, or timeliness of appeal which have not involved a previous hearing. The files can be assembled quickly, no transcript or recording is required and the decision can usually be completed by issuance of a simple form decision.

Many cases properly appealed on the merits involve no dispute as to the facts and no real dispute as to the statutory analysis; the appellant is simply angry that he or she lost. Requirements for appealing to the second level differ little from those at the first level. Consistent with the purposes of the program the process of filing an appeal is simple. There is no fee. Acceptance of the appeal does not depend upon the validity of the objections stated on the appeal form or on other technical requirements. Appeals based on anger or annoyance with the decision must be considered even though the objection is to the provision of the law rather than to its application. These cases deserve careful attention although few are involved with technical complexities, and they do not require research or elaborately drawn opinions. Most involve review of a typed transcript or tape recording of lower level hearings scheduled at 30-minute intervals, often with 20 minutes or less actual hearing time. Transcripts of 30 pages or less are typical. Most of these cases may be disposed of in from 30 to 45 days.

The greatest bulk of appeals involves cases raising true and often complex factual disputes or varying interpretations of the law as applied to the facts. These are the types of routine cases considered in the introduction to this section. Certain time-consuming steps must be followed, and the disposal periods may range from a few weeks to a few months.

There are two types of appeals for which the time required for decision may not be entirely within the control of the appeal authority. Some cases may require extensive review, research, and information in addition to the unemployment insurance laws, regulations, and policies that are normally within the knowledge of qualified reviewers. These are not numerous but they can require extensive time and their significance in applying the knowledge to later decisions may justify the time required for a lengthy and detailed opinion. When cases require hearings for argument or additional facts, additional time is involved. Decisions may be delayed by postponement of hearings by request of the parties. Delays for the filing of briefs may extend the time required for decisions. Interstate appeals may involve procedures in separate locations. Appeals of these types should be resolved as promptly as possible but it is logical to exclude them from the precise measure of a standard.

From the review, it appears that all states have some of these drawn-out types of appeals but that some types consistently appear in one state in greater numbers than in others. Rather than attempt to identify and count each of the kinds of cases that might be excluded from a standard, it is recommended that a single percentage broad enough to cover all such cases be excluded from the standard. Most appeals authorities interviewed during the review estimated that approximately 20% of the second level appeals fall into these more time-consuming categories, and samples of completed appeal files appear to bear out this estimate.

It is recommended that a standard be made applicable to 80% of the second level appeals. At the top point it is recommended that the standard require 80% of the appeals to be decided in 75 days or less. The statistics indicate that states that make substantial numbers of decisions within 75 days also make a relatively high number within 45 days. Success at one level appears to correlate with success at others. Overall effectiveness, however, depends upon an awareness of the importance of time at each processing stage, beginning with the filing of the appeal. The fixing of a standard at the middle range as well as at the top would emphasize the need to perform each step of the processing in the quickest possible time.

It is recommended, therefore, that in addition to requiring 80% of the second level appeal decision to be made in 75 days or less, the standard should require 40% of the decisions to be made in 45 days or less. This takes into consideration the fact that many second level appeals include jurisdictional issues that require no review of a hearing transcript, that many others can be quickly screened from the regular flow of decisions, reviewed and decided fairly and quickly within well established precedents. These cases ordinarily can be released as form decisions and should be disposed of easily within 30 days. They provide a state with a substantial portion of the cases that would have to be disposed of within the 45 day period.

In 1979, 17 states decided more than 40% of their decisions within 45 days and an additional 12 states fell short by less than 10%. Eleven states that would require the most substantial effort toward improvement to meet any effective standard made less than 20% of their decisions within 45 days.

At the higher level of the recommended standard, 14 states in 1979 disposed of 80% or more of their decisions within 75 days. An additional 16 states fell less than 20% short of this goal. Nine states that would require substantial change to meet the standard made fewer than one-third of their decisions within 75 days. Ten states in 1979 would have met both requirements of the recommended standard.

These various figures suggest that the proposed standard is a reasonable approach. It would require adjustment in a majority of the states, although closer attention to the details of present operations may be all that is needed to meet the requirements in many states. It would have little effect on one-fifth of the states which are performing well at present and would have the most severe impact on the one-fifth of the states which have been least attentive to the factor of timeliness. For states in this lower one-fifth, substantive changes may be required, in some instances even involving legislation.

If it is determined that a standard will be adopted, it is recommended that it be preceded by a request for proposals by states for meeting the standard. When legislation, or other changes requiring time, can be established as the only method by which the standard can be met, exceptions from the standard should be made to allow reasonable time for the needed changes.

In some cases, backlogs of appeals occur when work loads have not increased by more than the anticipated amount. These cause delays which should have been avoidable and are the principal cause of the need for a standard. From time to time, however, sudden and dramatic increases occur that are unexpected. It is acknowledged that it may be difficult to recruit review staff quickly because of the professional or experience qualifications required for the review of the second level appeals. It would appear appropriate to consider that a special circumstance exists when the number of second level appeals filed in a state has exceeded the number filed in the previous year by more than 25%. States in this position at the end of the year in which the increase occurred would be considered in compliance if a plan of action is submitted to and approved by the Department of Labor.

In summary, the recommended standard is

(1) 40% of all cases decided within 45 days,
(2) 80% of all cases decided within 75 days,
(3) Annual retroactive exemption when case load has increased by 25% or more and plan of action is submitted.

This proposed standard is not one derived by comparison outside the second level system. Because of the great diversity among the states, even those sampled, statistical analysis does not yield precise measures. The states' procedures are not even internally uniform. Further, while the bulk of cases fit the routine model described in the introduction to this part, many do not. Some allow rapid disposition, while more time is necessary for others. Certain cases are exempted in recognition of their inherently time-consuming nature, and allowance is made for periods of inordinate case load increase. The standard is flexible yet demanding. Historical performance indicates that the standard would not be so loose as to allow effortless compliance by the states nor so strict that it would place an unreasonable and impossible burden upon them.

PART IV
CONSIDERATIONS FOR TIMELY DECISIONS

Introduction

Although the stated purpose of this report is complete when it has been determined that a time standard is necessary at the second level and such a standard is suggested, to stop there would be to leave the report unfinished. Any analysis which finds a deficiency in an area and recommends guidelines to limit the problem should also provide functional suggestions which go to the core of the problem. However, because of the varying makeups and procedures of the second level authorities, a uniform analysis is not possible. Moreover, it is believed that the states have the clear right to establish their own procedures and organizational structures. For this reason no attempt will be made to establish a "model" second level authority for each state to adopt. What follows are some general recommendations relating to (1) particular types of procedures followed in some states, (2) procedures that are uniform throughout the states which could normally stand some improvements, and (3) specific innovative suggestions for various areas which could be applicable to most second level authorities.

Before a second level may be analyzed it is necessary to reduce it to its component parts. There are three functions which must be accomplished within each second level regardless of its size or format. First is the administrative function, entailing such activities as personnel and work load management. The work load management may consist of monitoring the work flow within the office, and may include the screening of cases to determine proper channels for handling them. The second primary function is the handling of clerical duties. This includes docketing incoming cases, preparing and processing notices, handling incoming information from parties, preparing transcripts and preparing and mailing decisions. The third, and most important, function is that of the actual decision making. To perform this function the record must be reviewed and a decision prepared.

While the three functions may be separate in theory they are seldom so in fact. A second level with a relatively light case load will probably have the administrative screening function completed by the members themselves. The remaining administrative function will most likely be combined with the clerical function, and those duties will be performed by one or two individuals. An extremely large second level authority may well have some of these functions partially combined in certain individuals and separate in others. While it is not believed to be necessary that each employee of the second level be capable of being pigeonholed into one category or another, it is necessary to be able to determine who performs the various functions.

By analyzing itself, a second level might determine that the administrative function is not centralized but variously performed by the members or the clerical staff. Such a realization will allow the second level to determine whether or not it needs a specialized administrative officer. That analysis would be affected by factors such as the size of the work load and the amount of a decision maker's time that is necessarily spent performing the function.

Such a hypothetical consideration is a classic example of management analysis, and it is this type of analysis which second levels will have to undertake in order to improve their timely disposition of cases. It is submitted that a thorough understanding of the administrative adjudicative process is necessary to make such a managerial analysis, and without such knowledge management consultants could be counterproductive. However, the principles used are valid and necessary even if technical labels such as "linear analysis" are not used.

With or without outside influence second level authorities are changing. The changes have been dictated by the phenomenal increase in case load. In changing to accommodate the extra work the understandable tendency is to retain as much as possible, making changes only in specific problem areas. It is submitted that overall reevaluation by the second level authorities is necessary. Reevaluation here is not equated with change. Perhaps evaluation would be a more proper term, particularly for second levels which have been too busy trying to get yesterday's work done today to be able to make an in-depth evaluation of themselves.

An overall evaluation of how it currently meets the three basic functions will allow a second level to determine if it currently needs any structural changes. A second level which has never made an analysis of its administrative function might find that what had seemed to be several small and isolated problems of "bottlenecking" work load could best be solved by centralizing administrative authority instead of adding a clerk or changing a form. On the other hand, after making such an analysis, the second level might find that an historical bottleneck was the result of too many functions being combined at one location. Such a problem might be resolved by relieving an individual of clerical duties which prevented accomplishment of necessary administrative duties. Beyond solving problems, such an analysis might allow a second level to see areas which could be greatly streamlined with minor changes.

This general approach allows the second level to rationally plan how it will accommodate what currently seems to be an ever-increasing case load. As noted, evaluation does not mean change. A second level may find that its current structure meets its demands and is flexible enough to accommodate reasonably foreseeable increases. Such a second level would still have benefited by being secure in the knowledge that its structure is sound and would also be able to designate areas, through the analysis, which might cause problems in the future so as to allow it to make contingency plans.

Most second level authorities which have not previously made general functional evaluations would probably be able to benefit from them by way of making some necessary changes. This is not to say that such changes need entail any major structural or procedural change. Minor task reassignments and the addition of some support staff might streamline the system so as to result in great time savings with no basic changes being made. However, it is submitted that a second level might look at its own evaluation and determine that major changes are needed, such as the addition of legal assistants to help the members review cases, or the elimination of lengthy trips by the second level authority for evidentiary hearings. The point is, regardless of any changes a second level might or might not make, a general analysis will give a true overview to a second level authority which has previously been solving problems as they become critical.

Management

The skills of management are as important as the skills of adjudication in handling present day work loads. Management capability has fallen behind adjudicatory capability in a number of states. As management has developed as a science, its skills and techniques are derived from a whole field of specialized study. When appeal loads by the thousands are encountered, efficient and timely disposition requires the best use of managerial skills as well as the best input of adjudicatory skills.

Each second level authority should have access to the services of someone who is thoroughly knowledgeable in management techniques and who understands the principles of budgeting, the cost model, personnel management, statistical reporting, the analysis of statistics for improved management, and management. In large states an individual with these capabilities should be a staff member of the appeal authority. In smaller states, cooperative arrangements should permit the part-time use of management analysis staff from the unemployment insurance agency.

The reason expressed most commonly by appeal staffs for delay in second level decisions is backlog of appeals. However, backlog is a symptom. What caused the backlog is the reason for delay. Sudden increases that are unpredictable will understandably cause backlogs. For the past seven years, however, except for 1975 when a 23.5% increase occurred and in 1978 when a 1.3% decrease occurred, the rate of increase has been fairly consistent at aproximately 12%. For predictable increases, good analysis and good management can prevent backlogs.

Second level authorities are often confused by the budget process. Management-oriented staff assistance should help alleviate misunderstandings. A part of the confusion derives from the cost model practice of combining all time spent on all appeals activity into a single MPU (minutes of time spent per unit, or appeal). The national office should consider a specific informational release to explain how the necessary details for the second level authority can be extracted.

In this area second level authorities complained that contingency financing (which provides funds for work load increases beyond the level approved in the budget) provided additional resources only after the additional work load had been completed. The second level of appeals is in an especially good position to predict and staff for contingency work load before it occurs. First level appeal work loads are an accurate gauge for predicting second level work loads. The percentage of second level appeals to first level appeals tends to remain constant, regardless of the increase or decrease in appeals. The national percentage of first level decisions which have been appealed to the second level in recent years follows.

1971 – 15.4%
1972 – 15.2%
1973 – 15.3%
1974 – 16.4%
1975 – 15.9%
1976 – 16.2%
1977 – 17.4%
1978 – 16.9%
1979 – 17.6%

Because the second level increase begins some time after the first level increase begins, analysis in individual states may predict second level increases so that necessary recruiting can begin in advance. Management specialists may be able to develop specific models beginning with the number of claims filed to predict second level needs with accuracy.

Communication between the second level appeal authorities and the unemployment insurance agency should be improved. In some cases, small disagreements over policies are being perpetuated by the continued issuance of conflicting decisions. It is unfair to use the claimants as the foils for such disagreements, and the process is costly and time consuming. Conference and consultation between the second level authorities and the agency are not inconsistent with the independent nature of the appeal authority. Solutions by this method would be to the advantage of both if a standard is established.

Communication between the second level authorities in different states and the national office should be improved. Second level appeal authorities have no contact in their states with anyone who has similar problems. In the past, few opportunities have been provided for interstate meetings or conferences for exchange of informatition. As this report is being developed, one such regional meeting has been held and the national office has developed plans for other meetings. This trend is recommended and encouraged.

Communication in another area is also a problem. By policy, all communications from the national office to a state are to the head of the state agency for distribution to the concerned divisions or sections. Because the second level appeals body is independent, communications specifically referring to their function are sent to them, but other matters that may be useful to them are not. These are primarily in management areas. It is not a simple problem. The appeals authority would be burdened by receipt of all releases. The person responsible for management functions should help materially by selecting for the appeals authorities those releases that affect them.

Management and appeals specialists who have not worked closely together will need to develop a mutual understanding. Some second level authorities mistake tradition for requirement and resist change by contending it is not permitted. Work load is often described by appeals specialists in terms of the most difficult cases, matters requiring extensive research of laws and areas uncommon in unemployment insurance. Such cases are in the minority. A majority of the cases can be resolved by unemployment insurance law and interpretation commonly familiar to experienced reviewers.

Management specialists, on the other hand, are often inclined to view the appeal process as only a slight modification of the informal local office decision from which the appeal originated. This is a misconception. The appeals system must be competent to handle the most difficult concepts that arise, and the reviewer for every case, no matter how simple the issue, must be capable of identifying and evaluating evidentiary facts, applying law and policy, and identifying any aspect of the previous proceedings that failed to meet the requirements of due process. Management improvement of appeal functions will require understanding and candor on the part of both.

Activities not Related to the Appeal Decision Process

Any management analysis of timeliness must be directed to efficient utilization of staff. For a second level authority to consider only its case-deciding process ignores those areas where second levels are often required to devote some time, but which may not be placed into a case-deciding category. As these activities become more and more time consuming, they must be considered in any analysis of appeals promptness. The items considered are not common to all states and others not considered herein may exist in some of the states.

Non-Unemployment Programs

Most second level authorities are required to consider appeals from the Work Incentive Program system. Some second level authorities have other appellate duties in areas such as a disability compensation program. The case load and time requirements for such programs must be considered when analyzing the second level authority in relation to timeliness. Proper staffing and funding must be provided to accommodate the demands from these programs. To ignore them in a management analysis is to allow unplanned burdens and strains on the overall second level system.

Precedent Reporting

While no uniformity exists, many second levels spend a certain amount of staff time compiling, indexing, and reporting their precedent decisions. Whatever the staff requirements may be, they must be taken into account when the overall system is analyzed. Streamlining this area, where possible, could free man-hours to be applied to the case-deciding process.

Court Appeals

When a second level decision is further appealed into the court system, a certain amount of time is consumed by the second level staff in relation to the appeal. Minimum requirements include preparing and transmitting the "record" to the court. However, some second level authorities go beyond this and become actively engaged in the litigation. Court appeals are constantly increasing in number, and the time requirements placed upon a second level are likewise increasing. This function is properly a part of any second level management analysis.

The type of analysis suggested herein is related to day to day staff operations. It has no relation to a cost model analysis or the question of from what area funding is provided for the function. It is not suggested that any second level function not directly related to case decisions need be changed. However, streamlining, where a second level authority finds it proper, might be beneficial in relation to efficient staff utilization. In any event, a fair appraisal of these functions should be integrated into a case processing analysis so as to provide a proper perspective of the second level authority.

The Mechanics of Decision Making

The review did not indicate that clerical processing of appeals, except for the typing of transcripts of the first level hearing, caused a significant delay of appeals decisions. If a standard for timeliness was established, however, it would be increasingly important that each processing step, even those presently requiring only a few days, be done as quickly as possible.

Clerical operations tended to be more similar among the states than the procedures for reviewing, deciding, and writing appeal decisions. No single system of clerical processing or decision making procedure seemed to be the sole solution to the problem of timeliness. The following comments, therefore, are derived from observation of various processes in different states. For states that anticipate difficulty in meeting standards of timeliness with their present system, these comments may be useful.

Filing of Appeals

The filing of appeals often occurs outside the immediate jurisdiction of appeal authorities, most commonly in local offices of unemployment insurance agencies. The offices at which appeals are filed can assist the higher appeal authorities by their explanation of the decision being appealed and by prompt forwarding of the appeal documents. Second level appeal authorities have been traditionally somewhat isolated from the other activities of the unemployment insurance agencies. They should seek to establish better communication because a cooperative effort may help materially to speed appeals decisions.

Appeals should be forwarded from the local office the same day they are filed. If appeals documents are being delayed by more than a day in transit, consideration should be given to a courier or other priority delivery service for transmitting appeals, especially from larger volume offices.

Telephone notice from the local office to the second level authority that an appeal had been filed would permit preliminary processing while the appeal documents are in transit. This would be especially useful in states where the notice of appeal inquires about desire to be heard or to submit written argument or briefs, and processing cannot continue until the time specified for these requests has expired. Notice sent upon receipt of the telephone call would start this period prior to receipt of the appeal form and while the files are being accumulated.

The subject of explaining decisions and appeal processes to would-be appellants by local offices is a delicate one, because explanation should never be designed as an obstacle or to discourage appeals. If, however, skillful explanations reduce the number of appeals that have no chance of success, such as objection to the law, rather than to its application to or the facts in a decision, both the appellant and the appeal authority have benefited. Local offices may be hesitant to discuss second level appeal processes in any way because of the independent nature of the authority. Second level authorities should work co-operatively with the agency to develop materials or guides, or perhaps printed explanations of the decision process to assist applicants.

The factors that lead to high ratios of second level appeals to first level decisions may merit study in states where that ratio is very high. The reason for substantial difference among states is not immediately evident. Ratios range from 12% to 22%. Likelihood of success does not appear to be a controlling factor. Among the states that decide relatively higher percentages of decisions in favor of appellants, some have high and some have low ratios of second level appeals to first level decisions. The national ratio in 1979 was 12.8%.

Preparation of Appeal Files for Review

A number of effective multi-purpose forms are in current use, by which a single typing of information provides such items as notices, review sheets, transmittals for decisions, requests for records, and related documents.

Before appeal files are delayed for the request of incidental information or documents from local or central unemployment insurance offices or from the lower appeal authority they should be reviewed by someone capable of determining whether or not they are essential to the second level review.

Docket, locator, or other cards should be utilized as a tickler system, not only to control the location of appeals files but to call attention to appeals at various intervals of time in their processing to assure that they are in process and on schedule.

A listing of the principal activities in the processing of claims with spaces for recording when they are completed is useful, not only for emphasizing the importance of time but as a management tool for determining where problems in timely processing have developed. It should be prominently placed in the front of the folder, or printed or stamped on the front of the folder or jacket containing the appeal files. It may contain such items, depending upon local procedures, as appeal filed, received, transcript ordered, received, assigned to reviewer, reviewer completed summary or draft decision, or decision approved, decision typed, duplicated, mailed. Only the principal processing items should be included. When the listing is too detailed, the entry of minor items becomes neglected, inviting omission of dates for completion of major processes.

Prominent display on the front of the appeal folder or jacket of the date on which the decision becomes delinquent assists in achieving goals. If a Federal standard is adopted, states should consider noting the expiration dates of acceptable time limits in this manner.

Transcripts and Recordings of First Level Appeals Hearings

The record of the first level appeals hearing is, in most cases, the single most important item reviewed by the second level appeal authority in arriving at a decision. Some states obtain typed transcripts for all second level appeals that have been preceded by a first level appeal hearing. In other states all appeals at the second level are reviewed by listening to electronic recordings, usually cassette tapes, of the first level appeal hearing. Others use typed transcripts for some reviews and cassette tapes for others. Without doubt, the tape recording is available for review far more quickly than typed transcripts. Some typed transcripts in the states reviewed were available in a week. The majority required far longer, some longer than a month. When typed transcripts are considered essential for review, it should also be considered essential that they be available in an average of one week from the date requested and no longer than ten days. Transcripts are sometimes produced by the section responsible for first level appeals. Second level authorities should not be content that a delay is occurring outside their jurisdiction. First level authorities should not consider production of transcripts a low priority activity. Existence of a standard would make the promptness of second level appeals the concern of everyone. If the system is not producing transcripts promptly, consideration should be given to a change in the method.

A typed transcript in every case is justified primarily when duplicate files are prepared for the simultaneous review of several people. When a single review file is prepared and passed from one reviewer to another, tape recordings are efficient and time saving. States that have developed techniques for use of tape recordings for review of second level hearings generally expressed the view that this method takes no more review time than transcripts. States that never use tape recordings defend the exclusive use of typed transcripts primarily on the opinion that it saves time for the reviewer.

The parties' review of the electronic recording of a hearing may be just as effective as a typed transcript. This may be particularly true for an attorney who has entered the case at the second level. Voice intonations and the manner of presentation may reveal much more when heard than when read. In any event, the same basic data are supplied. Upon receipt of an appeal, the second level could duplicate the recording of the first level hearing onto a separate cassette tape which would then be promptly sent to the local office nearest the parties. The notice of receipt of appeal to the parties could then indicate that the tape was available for review in the local office of the agency at the parties' pleasure, but that any written response must be received by the second level by a stated date. After that date, the case would be ready for review unless further hearing was contemplated. Such a system would allow time periods to run concurrently as opposed to consecutively. The time necessary to type a transcript would be eliminated because tapes may be duplicated on current machinery in extremely short periods of time. Instead of notifying the parties that a transcript might be available if requested or would be available when completed, and then having to wait for another response period after the request for, completion of, and mailing of the transcript, the single time period would begin to run from the notification of receipt of appeal.

Some states that achieve good records for timely disposition use typed transcripts exclusively. In others typing of transcripts is a major cause of delay. States whose poor record of timeliness is caused, at least in part, by the delay of typed transcripts should explore the use of tape recordings. The national office should seek assistance from states that use tape recordings extensively to develop materials and suggestions for their use. It should describe the equipment needed, the technique of review, methods of identifying specific portions of the taped materials for subsequent reviewers, how recordings are made available for review by the parties, the feasibility of copying tapes where there is simultaneous examination of an appeal by more than one person, and some of the more advanced audio services that are available.

When typed transcripts are used exclusively, availability of stand-by contract services should be considered for occasions when backlogs or other problems are preventing timely production of typed transcripts.

Formal Hearings Before the Second Level Authority

Clearly, one of the most time-consuming steps in the appeal process is the formal hearing before the second level authority. Logistics alone, such as unavoidable continuances, may consume relatively large time periods. Some states grant formal hearings for the further presentation of evidence in every case, some only in a few, some in none, and some grant formal hearings for oral argument by the parties. While a consideration of the merits of formal hearings is not a proper subject for this report, it is noted that a state having difficulty meeting a time standard should review any hearings procedure to determine if needless delay is occurring so as to take remedial action.

Assignment of Appeals for Review

Reliance upon review of appeals by assistants prior to the decision by the group or the individual designated to make the second level decision has become the only way many states have been able to cope with the volume of appeals. Lower level appeal authorities can add hearing officers as work load increases. The number of second level authority members in a state is fixed by law and cannot be expanded, so only the assistance of the review staff can be increased, although a few states which provide for delegatable second level review by the head of the agency function much like the lower level authorities. For a work load of 3,000 appeals, members of, or the individual constituting, the decision making authority would be responsible for 50 to 60 decisions per week. Twenty-five states have work loads in excess of 3,000. The importance of the review staff is evident and its efficient use can have a significant effect on timely disposition.

Appeals should be pre-screened for the purpose of assignment by someone capable of identifying the types of issues and estimating the likely degree of complexity. This permits best utilization of staff so relatively new reviewers can be introduced to new types of cases and new issues when the pressures of work load are least demanding. It permits the best use of known specialized expertise of staff members.

Decisions may be delayed by reviewers if they are put aside during the process of review because they are dull or difficult and a different case is selected for review. This has been curtailed in some states where, instead of assigning groups of cases, they are assigned one at a time from a pool, so that the reviewer works on one case until its completion before accepting another from the pool.

Quotas are distasteful and of limited use in controlling professional level work such as appeal review. Some appeal authorities, however, have created the equivalent of a reverse quota by limiting the maximum number of cases per day that may be assigned to a reviewer. This is inconsistent with the varying levels of attention required by different cases. In some states the number of cases is limited to weekly assignments to reviewers of substantially fewer than one-half the number of cases assigned to the referees who conducted the hearings and wrote the decisions being reviewed. Varying assignments to reviewers, recognizing the varying demands of cases, would appear more productive.

Electronic Docket Control and Decision Production

While some second level authorities use various forms of memory typewriters for decision production, there appears to be a marked reticence on the part of second levels to adopt and expand to the use of these machines. Further, few second levels, if any, use computerized docket control. These items are combined in this section because the systems may be integrated and used together. However, either may be used alone. The typewriter function will be considered first.

There are two basic types of memory typewriters available, although the technology is changing so rapidly as to defy specific categorization. First is the simple memory typewriter. The machine has limited storage capacity, but allows for correction and automatic reproduction of documents. Further, certain material may be retained "in memory." This repetitive material may be recalled when necessary and included in nonstandard material or used in a "form." The other type of machine is more sophisticated and is generically designated in the industry as a word processing system. Such a machine will perform all of the functions of a memory typewriter, but has additional features. The memory information may be permanently stored on removable cassettes or "floppy disks." The machines also feature electronic screens which display a portion of the recorded material, varying in amount from several lines to several pages depending upon manufacturer. They allow for rapid alteration of typed materials and rapid retrieval from a much larger memory bank of varying uniform items because of their greater capacity and flexibility. The word processing machine is substantially more expensive than the limited memory typewriter.

The value of these machines in the production of decisions may be great. Even if each decision is entirely prepared from scratch at the second level, the machine allows the typists to prepare a final clean copy in a much shorter period of time than would a regular typewriter. However, it is when a decision is uniform in whole or in part with previous decisions that word processing is particularly valuable. An example is a decision wherein the appeal is dismissed because it was not filed within the time limit required by law. Aside from the style of the case, the only information that varies normally are the dates and the issue attempted to be appealed. If the decision is standardized and in memory, the decision maker may list the information that would go into the blanks in the form. The typist then types that information in the sequence that it will appear, placing a "switch code" after each item. The form in memory has a "switch code" preceding each of the blanks. After typing the variables, the operator merely starts the machine which begins with the form in memory until it reaches a switch code, then switches to the first variable piece of information, after which it switches back to the form, continuing on to the next switch code and so on until the final decision is finished. The process requires no operator control once the program is begun. By typing what amounts to two lines and hitting a button, the operator has produced a form, yet personalized, decision. Further, the word processing systems have high speed printers which can produce copy at a rapid rate. In addition to producing "form" decisions, the machines also work well for partially standardized decisions. Because of the virtually unlimited memory capacity, the second level could use standard paragraphs for such things as a definition of misconduct and a further definition of the ramifications of continued unreported absences.

In addition to decision production, these machines are also valuable in the production of notices and transmittal letters, being sometimes more efficient than printed forms. Further, the machines allow quicker production of transcripts of hearings from the first appeal level.

With the growing tendency to use more "form" opinions and more standardized opinions, word processing capabilities are of extreme value to second level authorities by allowing more rapid production of the final product. While the machines are expensive, one of the major advertising statements made by manufacturers is that one word processing operator will produce more work than two typists. Although clerical staffs in normal offices would be concerned about this feature, the ever-expanding second level work load should prevent the necessity for layoffs if word processing use is instituted.

Most second level authorities use manually prepared cards and forms to carry out the docket control function. The most sophisticated of these forms uses a multicarbon set whereby the raw data are placed, by carbon, at the same location on each copy. However, each copy is not a true copy but may consist of a totally separate form. Therefore, one typing will produce a docket control card, notice to claimant, notice to employer, and other file memoranda. Even this sophisticated system requires manual filing and subsequent retrieval for update.

An electronic alternative to this and similar systems is provided by current computer systems. The system consists of one or more terminals, the computer unit itself, and one or more output printers. The number of the variable units may be altered to meet the needs of a particular second level authority, and the entire system may be integrated with a word processing system sharing some common terminals and printers.

An incoming case is manually fed into the system at an input terminal with a visual read-out screen. The information from a case may always be retrieved by simply calling up the required information to one of the terminal screens. Information is updated by input into the system as the various stages in the case processing occur.

The system provides uniform record keeping. It further allows for instant analysis of a given case at any given time. In this regard the work of several individuals previously required to perform clerical duties may be eliminated so as to allow these individuals to perform other necessary duties. However, the management function is where a second level may truly benefit from such a system. By pre-prepared programs, critical lists of cases may be automatically shown and reviewed each day. As an example, at the beginning of each day the machine would automatically produce a list of all of the cases wherein a brief or other response by a party was due on that day. Instead of tagging files under a manual system or making no such check at all, the continued processing of a case could thereby be expedited. While an analysis such as the one given could be performed by a manual tickler system, when this step is multiplied by many critical dates, any manual system becomes overburdened. The computerized system provides great flexibility and ease of operation in the day to day work.

Moreover, it is in the area of management analysis that such a system truly comes into its own. Once the data is in the computer, it may be retrieved in any form or order chosen by a program. The work may be broken down by any chronological designation such as month, quarter, or year. It may also be broken down by the issues involved such as timeliness of appeal or work separation; similarly by type of appellant. Within any or all of these designations, information, such as the time to proceed through various stages of case processing, may be retrieved.

The potential forms of data retrieval are unlimited. Typically useful examples for management analysis would be a review of the time necessary in all cases to mail the decision once the decision maker has submitted it for production and processing. Another might be the average span between notification of receipt of appeal and receipt of final input material from the parties in an employer appeal. Such evaluation might show whether or not there was a bottleneck in the typing and mailing of decisions and whether or not too many extensions of time were being given employers in order to allow them to submit written briefs.

While it might initially be felt that such a system of electronic control and word processing equipment might have value only to second level authorities with extremely large case loads, this is not the case. The systems available are declining in sophistication and cost almost daily. While cost efficiency might be a critical factor to a second level authority with less than a thousand cases a year, even such a second level authority might be able to effectuate man-power savings with such a system which would have a strong offset against costs. Further, normal analysis deals primarily with manual operations time savings, and can in no way measure the management potential of such equipment. It is here that cost is difficult to assess. If such a system would eventually allow each case to be processed in ten fewer days, what then would be its worth? This is clearly a factor that must be considered when evaluating the benefits of such a system. It is submitted that any second level which processes over 1,000 cases a year should seriously consider such a system, and that second level authorities with lighter case loads should not dismiss the possibility without giving it full consideration.

The Role of the Second Level Appeal Authority

In the sequence of this report, the next subject would logically be decision making. In the present state of the work load, the method of decision making is inseparable from the question of what constitutes the primary role of the second level appeal authority.

Each second level authority should give serious thought to this question. The increase of work loads has already forced many second level appeal authorities to abandon or delegate responsibilities and tasks they had previously performed. With increasing work loads appearing to be inevitable, decisions recognizing the principal role will be necessary so that in abandoning or delegating tasks the authorities will be able to preserve for personal attention the tasks with highest priority.

A review of the historical development of the activity gives some indication of the growth that has already forced change in the structure of second level appeal authorities and in the procedures for decision making. In this respect an excerpt from activity reports made by states to the Social Security Board in the early years of the unemployment insurance program gives some perspective to the change that has occurred:

State	*Second level appeals pending March 31, 1941*	*Second level appeals pending December 31, 1979*
Florida	7	582
Illinois	92	3,381
Minnesota	3	340
Missouri	154	758
New Jersey	123	441
New York	405	2,557
Rhode Island	0	225
Utah	1	66
Washington	8	407
United States	2,577	32,947

The figures make it clear that work load management was not a major concern of the second level appeal organizations when they were first created. The precisely intended role of second level appeal organizations when they were first created is subject only to speculation. As previously noted, the first level appeal is mandated by the Social Security Act, but a second level appeal is not required. However, the Social Security Commission published draft bills and draft regulations to assist states in developing state unemployment insurance legislation and regulations which provided for two appeal levels. At the first appeals level provisions were made for tribunals or hearing officers to conduct hearings and make decisions. Laws did not limit the number of hearing officers a state might have, and they did not specify the kinds of background or experience these individuals must have. Provisions in state laws for second level authorities were not so precise as to what they were required to do and often made optional their choice of action in dealing with individual cases. In some states the second level authority was vested in individuals or commissions which were responsible for overall policy for the state's unemployment insurance program and operations. In other states, an independent group was created but with specifications that the background of appointed members would qualify separate members to represent the interests of the public, employers and employees.

The most logical conclusion from this origin is that the principal reason for the existence of the second level authority was its role in developing policy and precedent for applying the eligibility and disqualifying provisions of the state unemployment insurance laws. This assumption is further supported by the fact that many state laws provided for direct referral of cases to the second level authority, or for it to take over a case on its own motion, whether or not there were appeals by the parties.

The number of cases before second level authorities in the first years of operation permitted personal consideration by the members of the second level authority of all cases on appeal and allowed time for deliberative consideration and executive session discussion for all necessary cases.

It is believed, therefore, that the second level role may be fairly divided into two categories. The first category, is to provide appellate reviews on a case by case basis in order to insure a proper decision in the case. However, in performing this role the second level will often also fulfill its second, and primary, role. Certain cases go beyond the routine and raise general questions that are novel in relation to an interpretation of the law or application of a peculiar fact situation to established law. By analyzing these cases, the second level goes beyond the simple case decision into the realm of setting precedent. By fulfilling this role, the second level truly acts as an administrative Supreme Court in relation to its limited area of responsibility.

Each decision reached by the second level is an act required by the first role of providing case by case review. However, not all of the cases will present a novel question. There is no way for the second level to avoid its first role; the cases are there and simply must be decided. The problem which might arise is in relation to the second role. When the case load increases to a level where the second authority is strained to even decide all of the cases, much less in a timely manner, the second level authority may well have trouble reserving enough of its time to thoroughly analyze the novel case so as to establish precedent and guidance for the agency. Failure to do this is an abrogation of a primary function, one which may not be properly accomplished by any other body. While a case by case review is clearly important, this is a function that the second level may delegate in part because the goal is merely to insure that the proper decision was reached by the first level in a routine case. By sufficient delegation, the second level allows enough time to itself to fully analyze the novel cases.

The situation would appear to demand consideration of changes, including legislative change if required, to preserve and enhance the most significant purpose of the second level authorities. Present projections would not indicate diminished work loads or significant increases in budget resources. Inventiveness and change appear to be the most viable means of coping with the situation.

Structural Changes by Second Level Authorities

It is obvious that a three-person, part-time second level authority may not personally process and individually review four to five thousand cases per year. To relieve this problem a second level may be made full-time and the number of members may be increased from three to five members, or more. However, at some point in time a case load reaches a level wherein individual, much less group, attention by the members cannot be given to the individual cases without generating an ever-increasing backlog of cases. Further, the members become so burdened with the individual cases, simply striving to reach decisions that they begin to drift away from their primary role of setting precedent. Temporarily solving the problem by increasing the number of members, while merely a stop-gap measure, creates further problems in that it is then difficult for the second level to coordinate its opinions into a cohesive line of authority.

These problems are currently being addressed by the various second levels through the use of employees who review the records of a case and make recommendations for decision. In some cases the individuals prepare a synopsis of the record and a draft opinion for a member. As the case loads continue to increase, the members are still unable to devote the necessary time to these cases so as to cause them to necessarily rely upon the synopsis.

The employees in question serve the function of a law clerk and are usually attorneys. They have titles varying among the states but their function is substantially similar. Sometimes more than one member reviews the law clerk's work in an individual case. This designated review and re-review take much time and often causes bottlenecks when a great number of cases are waiting for a member's attention for initial review or review of a previous review. While some second levels have authorized decisions to be issued by one or two members in situations such as this, some second level authorities still issue decisions purporting to be the decision of the full body signed by each member. These decisions are, in fact, one-person decisions, and are often truly the decision of the law clerk who may be the only individual to have actually reviewed and considered the record.

It is submitted that this situation has evolved by giving lip service to the former theory that the second level authority decides each and every case *en banc*. By propagating such a system, built-in delays are necessary for the various review stages. Also, as the case loads continue to increase the system takes on the appearance of an assembly line which, while fine for the individual case review role, seriously impedes the precedent-setting role. A second level authority which may be totally concerned with processing routine cases, when placed under severe time restraints will seldom be inclined to grant much time to the novel case. If fifty routine cases may be processed by the members during the time necessary to fully consider one novel case, and time is of the essence, it is not only obvious but understandable which cases the second level authority will consider. This is in no way ascribing any improper motives to them; the second level authority simply chooses the most efficient utilization of time.

For second level authorities where the above-described situation or one similar to it has evolved and the time pressures have not been alleviated due to the continually increasing case loads, it is submitted that a major change is necessary for the second level to be able to timely process its cases and still have adequate time to consider the novel cases requiring precedent setting decisions. Such a change may only be accomplished in the area of the decision making process. The change must be evaluated in relation to the nature of the cases on appeal.

A great number of appeals are truly routine, presenting no new novel questions of fact or law. This is not to say that they are not important to the parties or that they do not entail a decision making process. Strongly contested fact situations must be evaluated. Further, numerous factual settings will not fit nicely alongside the stated rules and do require some evaluation of legal principles. However, they do not have the impact of the first second level authority appeal considering whether or not a "lockout" not mentioned by a statute is truly a labor dispute situation so as to disqualify thousands of claimants. While it would be nice for the second level authority itself to consider each of the routine cases, as originally envisioned, when this cannot be done changes must be made.

It is suggested that a further evolution of the concept of a legal clerk might be helpful. If the legal clerk's job was upgraded to the status of associate second level authority member, that individual could then evaluate and decide routine cases assigned to him or her and actually issue the decision in his or her own name as an associate, second level authority member. Such a system could only work with the reevaluation of the administrative function by the second level authority. Incoming cases would have to be initially screened for assignment to the associate members. This requires an individual with legal training and experience in the unemployment appeals system, preferably a former referee or associate member. This individual would work under the direct supervision of the second level authority or a particular member but would normally independently make these case assignment decisions. Further, the associate member would work under the control and direction of the second level authority. Cases which, at first glance, were properly assigned to an associate might sometimes be found to contain serious legal questions which might need to be addressed by the second level authority itself. Upon consideration, the second level authority could remove such a case to itself or allow the associate to proceed but review the decision before issuance.

It would be important from a timeliness standpoint that associate decisions be issued with minimal review, if any. Second level authorities have the statutory or inherent power in most cases to withdraw their own decisions shortly after issuance, and if serious errors were made they could be corrected in that manner rather than bogging down the system with lengthy reviews prior to the issuance of decisions.

A further attribute of such a system would be the ability to allow for specialization. Particular associates could have specialties in narrow areas so that the administrative assignor of cases would be able to recognize such cases and assign them to individuals who were thoroughly familiar with most aspects of that area and could quickly issue a decision without having to go through extensive research and analysis. This specialization could evolve naturally or be created.

If associate members were used, the second level authority would then be free to consider the unusual and complex cases. The second level authority could still have assigned law clerks to aid it in its work but would not be under the extreme pressure inherent in a high case load system. Possibilities exist for assigning particular members the responsibility of reviewing associate decisions to verify that second level policies were being followed and to seek decisions meriting precedential analysis. Various other possibilities exist which might not be fully realized until the system was considered in detail in relation to a particular state's needs.

A further attribute of this system would be to allow an increase or decrease in the associate staff as mandated by the change in the case load. This is a flexibility which lower levels have, but second level authorities generally do not have.

While some states would clearly require legislative changes to allow for such a system, it is submitted that many second level authorities could create the system by administrative fiat under their general rule- and regulation-making power. The legal issues are too varied to allow for a general analysis herein and must be made on a state by state basis.

An alternative form of change would be to create several second level authorities. This is not recommended in that, being isolated and separate from each other, there would be no requirement of uniformity of action. As with increasing the number of second level authority members, this system is simply unworkable for the accomplishment of any goal other than processing cases.

A more structured approach, but one still allowing some flexibility and control by the second level authority would be to establish various divisions or subdivisions of the second level authority, each directly answerable to the second level authority. This would not be an increase in the levels of administrative appeals since all appeals would still come directly to the second level authority. However, upon review, a case could be assigned by the second level authority to a particular division which could consist of from three to five associate members. That division would then issue a decision for the second level authority, but it would be a group decision by that division. The divisions themselves could be expanded or contracted to meet the case load demands. Case assignments would be made in a fashion very similar to those suggested under the individual associate member system outlined above. Decisions of a second level authority division would be appealable directly to the courts as are second level authority decisions.

Other systems might be found workable, and, as in any innovative process, it is impossible to predict which form will clearly be the best. Further, it cannot be said with certainty that any such major structural change is mandated by the increase in case loads. It is, however, something that should be considered by any second level authority which is hard pressed to meet its current case load.

As a final note, it is believed that by delegating not only the work but also the authority to the individual who actually makes the decision, i.e., to an associate member, that individual's performance will be favorably affected. It is one thing to sit in an office and review cases for someone else's signature and another thing entirely to be the individual who signs and issues the decision. Without speculating on the effect on the quality of such decisions, it is believed that such an upgrading of morale and responsibility will lead to more efficiency on the part of that individual.

In conclusion, it is felt that a change along the lines of those suggested above will result in time savings by eliminating the need for repetitive reviews by members who have more valuable ways to spend their time and most probably will result in an increase in efficiency on the part of the individuals preparing the routine decisions. A large and fluctuating case load could be promptly handled. While the time saving factor alone could justify such a change, it further would allow the second level authorities to truly return to the fulfillment of the primary role for which they were established, that of giving considered guidance to the agency.

Prepared by Employment and Training Administration

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FLORIDA

Organization

The second level appeal authority under Florida law is the Florida Unemployment Appeals Commission (formerly titled the Florida Board of Review but changed by statute to its present name effective October 1, 1978). The Commission consists of three members appointed by the Governor. The Chairman, who must be a lawyer, is a full-time employee, devoting full time to the second level appeal function. The two other members are fully employed outside the government and are compensated on a part-time basis for actual hours devoted to reviewing and deciding appeals to the Commission. A clerical and stenographic staff and a staff of lawyers, responsible for assisting the Commission in reviewing and deciding cases, are the major operating units.

The Commission is an independent body. It is responsible for prescribing rules governing the manner in which appealed claims are presented and hearings are conducted at the first appeals level, but it has no administrative responsibility for the Unemployment Compensation Appeals Section which is the first-level appeal authority in Florida.

Work Load

Florida has suffered in recent years a rapid work load rise that was caused primarily by unemployment in the building trades. There were 1,612 second level appeals in 1974, which more than tripled in 1975 to 5,041. In the past nine years the number of second level appeals ranged from a low of 1,008 in 1972 to a high of 5,440 in 1976. In 1979, there were 3,497 appeals representing 2.6% of the national total.

Processing Appeals

Appeals are ordinarily filed in local unemployment insurance offices in person or by mail directly to the Commission's office in Tallahassee. Prereview processing of appeals is uncomplicated and apparently effective. In a reviewed sample, less than two weeks elapsed between the date the appeal was filed and the time the case records were ready for the decision making review.

When the appeal is received at the Commission's office, usually approximately four days after filing, records, including the tape cassette on which the first level appeal hearing was recorded, are requested from the Unemployment Compensation Division. When these are received the appeal is docketed and assigned a number (in sequence by calendar year). A single typing on a carbon interleaf form set produces (a) a docket sheet containing spaces for recording the date on which various steps in the decision making process are completed (b) notice of docketing to be mailed to the parties and (c) the transmittal used to transmit the decision of the Commission when it is completed. A locater card is prepared to track the file through the various processing phases. The appeal file, containing pertinent claims examiner records, the record, decision, and taped recording of the first level appeal hearing are sent to the Commission's review staff.

Individual Case Review

Review staff lawyers examine the records and listen to the taped recording of the first level appeal hearing. Written transcripts are rarely prepared. The reviewer prepares a written summary, which includes an outline of the evidence, how the evidence supports or fails to support the findings in the first level decision, and a recommended disposition of the appeal. When fifteen summaries have been prepared, the summaries and other records are prepared in loose leaf binders. Three identical sets are prepared, one for use of the Chairman in the Commission's office, the other two for the other Commission members. Currently one Commissioner lives in Miami, the other in Tallahassee. The regular occupations of both, however, involve frequent travel, so the summary binders are frequently sent and returned by mail. The summary files include work sheets for the Commissioners to reflect their view of the case. Where all Commissioners agree with the reviewer's recommendation the reviewer prepares a decision in accordance with the recommendation in the summary. Agreement by two Commissioners is sufficient for approval of a decision. When one disagrees, however, an effort is made to resolve the difference at meetings of the Commission. An effort is made to schedule these meetings at no more than two week intervals. In the sample of decisions reviewed, less than 5% were not approved by all the Commissioners. The Commission is authorized to conduct hearings but seldom does. Additional evidence, when needed, is obtained by remand and direction to the first level appeal authority.

Format of Decision

Written decisions reflecting the Commission's review are prepared by the review staff, subject to approval by the Commission members. A form decision which can be completed quickly by five brief typewritten entries, is used to dispose of decisions which affirm the first appeal level decision and for certain other dispositions on technical matters requiring no further explanation. In 1979 the Commission affirmed the first level decision in 87% of the cases so that more time-consuming fully written decisions were not used in more than 15% of the cases.

Report 329–45
June 1980

ILLINOIS

Organization

The Illinois Board of Review consists of three members appointed by the Governor. All three members are appointed and compensated on a part-time basis, and are engaged in other private activities which demand a major part of their time. The Board is primarily responsible for single claimant appeals from the first level appeal authority. There is a separate appeal body in the Department of Labor with no relation to the Board of Review that is responsible for labor dispute appeals and related issues in which the appeals of a number of claimants have a common issue. The Board has no administrative responsibility for the lower level appeal authority.

The Board's central office is managed by a Chief Hearing Referee who is responsible for administration and is a principal assistant to the Board in deciding important or policy making cases. The review staff of lawyers, called Referees, are under the direct supervision of the Hearings Supervisor. The work of this staff is extremely important in this operation because of the need of the Board members to decide a very large number of appeals within the limits of time imposed by their part time positions.

Work Load

The Illinois Board of Review has by far the largest number of appeals of any part-time Board in the nation, or, for that matter, of most full-time Boards. Single claimant appeals to the Illinois Board have varied from a low of 5,233 in 1971 to a high of 12,971 in 1979, which represented 9.6% of the national total. The number of appeals in Illinois in 1979 was the third largest in the nation.

Processing Appeals

The processing of Board appeals begins in the local office where most appeals are filed; even appeals directly to the Board are logged for control purposes and sent to the local office. The local office prepares the notice of appeal form and forwards its file to the lower appeals authority. The lower authority adds its decision and records, and sends the tape recording of the lower level hearing to a transcribing service for transcription of the tape. When this is done the notice of appeal is forwarded to the Board, where the clerical staff numbers and dockets the appeal, notifies the parties of the receipt of the appeal, and establishes a temporary file. When the files and transcript are received a permanent file is established, with spaces on the jacket for recording pertinent processing time, and the appeal is ready for review.

Individual Case Review

Completed files are screened by a legal assistant for timeliness of appeal, appearances of the parties, and the completeness of the file and the transcript. The appeal is then ready for the decision making process and is given to the principal review official who is called the Hearings Supervisor. This supervisor assigns the appeal to a lawyer on the review staff who is called a Referee.

Prepared by Employment and Training Administration

The reviewer examines the records of the appeal and the first level hearing for completeness and accuracy and to decide if the decision properly reflects the findings, the law and the applicable precedents. From this the reviewer determines a recommended disposition of the appeal.

When the case can be properly decided by a form decision, that is recommended. When an individualized decision must be issued, a draft is prepared by the reviewer. The draft of proposed decision or other recommended action is submitted by the reviewer to the Hearings Supervisor. This supervisor discusses cases of first impression or any cases involving policy or precedent with the Chief Hearings Referee or Board members and submits to the Board members a prepared decision. Other cases are submitted to the Board without prior consultation with a written recommendation for disposal of the issue.

Upon approval by the Board, the clerical staff types the decision, submits a copy for duplication, and mails the completed decision to the parties.

Format of Decision

Various issues that are determined to be routine, involving jurisdictional matters or no change in the decision by the lower appeal authority, are decided by form decisions that are individualized by the completion of various numbers and dates to identify it with the decision being reviewed. Approximately 85% of the issues can be disposed of in this manner. When new or policy issues are involved, when clarification of the lower level decision is needed, or when it is to be reversed or modified, a decision containing the findings, the legal conclusion and explanation for it, and the legal result is prepared.

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June 1980

MINNESOTA

Organization

Rather than providing for an independent Board of Review, Minnesota statutes provide that the Commissioner of the Department of Economic Security, or his duly authorized representative, shall review all appeals from the decisions of the Appeal Tribunal. The Commissioner has delegated this responsibility to the Commissioner Review Office. The Chief Commissioner Representative is the head of the office and, working along with him, are normally five other Commissioner Representatives, all of whom are attorneys. They individually review appeals and issue decisions. The office has three clerks and one clerk receptionist. The clerks handle the processing of all cases from incoming appeals to outgoing decisions. Additionally, the office has clerk stenographers who prepare transcripts of the hearings conducted before the Appeal Tribunal. This involves approximately six typists.

Work Load

Between 1971 and 1978 the Review Office work load increased dramatically from 478 single claimant appeals filed to 2,770 single claimant appeals filed. In 1979 the appeals filed dropped to 2,079. With the exception of the final year, the nine year period evidenced a steady and significant increase in work load.

Processing Appeals

An appeal from the Appeal Tribunal is filed when it is postmarked or otherwise received by a representative of the Department. As in other states, appeals may be physically delivered to the Commissioner Review Office through several means. First is direct mailing by the appellant to the Review Office, but this is somewhat rare. More often the appeal is mailed to the Appeal Tribunal which is located on the same floor of the same building as is the Review Office. Also, because of the use of his or her title, many appeals are directed and mailed to the Commissioner. The other normal method of an appeal being filed is by delivery to the local office of the Department, which forwards the appeal on to the Review Office or sometimes to the Appeal Tribunal instead. Through these various methods an appeal may be technically on file for from two days to two weeks before it is physically received by the Review Office. If it is mailed to the local office and postmarked one to two days before delivery, then mailed to the appeals division in St. Paul which routes it to the Appeal Tribunal, who then routes it to the Review Office, a significant time span may elapse. This factor has a significant aging effect upon the decisions of the Review Office.

When the appeal is received in the Review Office, the Appeal Tribunal file is checked out by a clerk who delivers the file to the staff attorney. While this individual is referred to as a staff attorney, he or she is really a case administrator. This attorney analyzes cases at the point of input to determine if a case has a jurisdictional defect such as not meeting the timeliness requirement of the Act. Because the Review Office is not authorized by statute to conduct hearings to gather further evidence in relation to an appeal, the attorney further analyzes the cases to determine if a superficial review indicates a need for a case to be remanded to the Appeal Tribunal for further hearing. This initial screening is also done by the staff attorney to eliminate from further processing cases that may clearly be handled in a summary manner. Cases not so eliminated are then returned to the clerks who cause the cassette recording of the hearing before the Appeal Tribunal to be transmitted to the transcription room. After the transcript is prepared, the fully completed case is returned to the staff attorney who assigns the case to an individual Commissioner's Representative for review.

Individual Case Review

The assignment of cases for review to the various Commissioner Representatives is not randomly made, but the cases are assigned to the Commissioner Representative best suited to handle them. The obvious value inherent in such an assignment method is issue specialization. While each Representative is aware of the general rulings in relation to each of the areas commonly ruled upon, certain representatives may fairly be said to specialize in a particular area or sub-area.

Other less easily definable standards may be used by the staff attorney to assign a case. One review officer may particularly dislike long involved cases whereas another is able to handle them efficiently and does not mind them. While both would be equally competent to handle such a case, the assigning of a case to one who prefers such cases promotes efficiency. Another Commissioner's Representative might be assigned a case because he or she is better able to "troubleshoot" unusual and non-recurring issues or situations.

Excepting cases which are remanded or dismissed, all cases before the Commissioner's Review Office are given formal hearings. The statute authorizing commissioner review clearly implies, if not dictates, that a commissioner review may not entail additional evidence. However, reference is made to hearings on appeal. It has been administratively, though not judicially, determined that the statute requires a formal hearing in each case. The only function such a hearing may serve is to allow the parties to further argue their case. After the transcription of the Appeal Tribunal decision is complete, a copy of the transcript is automatically mailed to all parties to the appeal, normally the claimant and last employer, then these parties have a substantial time period to review the transcript prior to the formal hearing.

The Review Office personnel do not travel to conduct hearings. All hearings are conducted in St. Paul at the Commissioner Review Office. The Review Office has telephone speaker hookups sufficient to allow it to conduct telephone hearings whenever the parties are over approximatey 100 miles from St. Paul. All parties wishing to "appear" at such a hearing are required to go to their nearest local office which also has the telephone speaker hookup. The Review Office is pleased with the phone hearing system and, contrary to what might be expected, such a system has not led to disjointed hearings getting out of control of the officer who is some distance from the hearing. All hearings are scheduled three weeks in advance. No record is made at the hearings.

After the hearing is complete, the ultimate decision of the case is made by the Commissioner's Representative. Only one Commissioner Representative is involved in each case, and there is no review of the decision of that representative prior to its publication. The Review Officer, using the system he or she prefers, dictates, writes, or types the decision and submits it to the clerks for final typing. After it is typed, it is proofread by the Commissioner Representative, signed, copied and mailed.

A review of a decision of the Commissioner Review Office may be made only by a Writ of Certiorari to the Minnesota Supreme Court, the highest appellate court in the state. No recollection of the court ever refusing to consider such a case occurred to the Commissioner Review Officers. The Commissioner Review Office is not required to participate in Supreme Court appeals past the point of preparing the record and transmitting it to the court. The office of the Attorney General represents the agency in all such appeals.

Decision Format

Decisions by Commissioner Representatives in Minnesota are predominantly short, form decisions. Numerous form decisions are in a typewritten "memory" so as to be easily retrieved and produced. By marking a form for such items as appearances before the Commissioner Representative, names of the parties, etc., a form decision may be quickly produced by a typist. Such forms adopt the findings and decision of the Appeal Tribunal so as to make those findings a part of the decision. A particular adaptation of this one-page affirmance is the form decision with memorandum attached. This memorandum makes additional findings as to fact or law as the Commissioner Representative deems necessary. It is a personalized statement addressing the particular case at issue. It is referenced to and attached to the decision. Other one-page form decisions cover jurisdictional questions such as dismissals or withdrawals by one of the parties. The only differences in these cases is the type of form used. The one other type of decision is the one which makes new findings of fact and conclusions, superseding those of the Appeal Tribunal. With the exception of a form introduction, such a decision is personally drafted by the representative of the commissioner and, therefore, personalized to the case.

A random sampling of 151 decisions was obtained from recently published decisions. Of this grouping, 55% included the one-page form decision on the merits. 27.2% of these decisions were the one-page form with memorandum attached. The average memorandum contains 1.4 rather short paragraphs. 4.6% of the decisions were dismissals relating to untimely appeals or appeals of issues that had become moot. 4% of the decisions involved withdrawals by the appealing party. 9.3% of these decisions were made using the longer, personalized decision. The average length of such a decision was 1.29 pages. Combining some of these categories, it may be said that 63.6% of the decisions involve one-page, form decisions that are not personalized to the case other than by name and date references. In 36.5% of the cases, a personalized reference to the case was indicated by the decision.

Sample Statistics

Forty-eight cases which were decided in 1979 were randomly selected for review. The sample population did not include summary jurisdictional type issues. 42% of the cases reviewed were appeals filed by employers and 58% were appeals filed by claimants. 41.7% of the cases involved the issue of job separation, wherein the claimant had voluntarily left his or her employment, and an equal percentage involved job separations wherein the claimant was discharged. The remaining 16.6% of the cases involved various issues of eligibility, such as availability for work or refusals of offers of re-employment.

The cases were analyzed for critical processing dates which reveal the following information:

Processing Step	*Average Number of Days to Complete*
Appeal filed to completion of typed transcript	61.5
Transcript completion to formal hearing	32.7
Formal hearing to mailing of decision	15.0
Total	109.2

While, as described above, other processing steps take place between the date of filing of the decision and the completion of the transcript, none of these steps requires more than a few days. Therefore, the majority of the time consumed in this step was taken up by the actual production of the transcript. In 1979, it was determined by the Review Office that excessive delay was occurring during this stage of an appeal. The Review Office was able to obtain the necessary funding to lease six separate word processing machines. Each consists of a full-screen memory unit. The machines were put into use in the latter part of 1979 and have been found to greatly facilitate the typing of transcripts from the cassette recordings. Because of the drastic change in processing procedures, a further sample of 1980 cases was made to determine the effect of the increased transcript production rate. 24 non-jurisdictional cases were reviewed. In these cases it was found that the time lag between filing of an appeal and completion of the transcript had been reduced to an average of 20.3 days. This resulted in an average saving of time for this step alone of 41.2 days in the average case. The 1980 sample revealed an average total time spent from filing of the appeal to mailing of the decision of 80.0 days. This represents an average decrease of 29.2 days from the 1979 sample. It may be seen that the time saved in the transcript production stage was effectively carried through to the decision date. This is a prime example of a second level authority which, through management analysis, recognized a problem and sought and found a solution to the problem. This one change, though it may have been somewhat expensive to effectuate, has resulted in a dramatic decrease in the amount of time necessary to process an appeal.

Report 329-51
June 1980

MISSOURI

Organization

The Labor and Industrial Commission of Missouri is the second level unemployment insurance appeal authority. There are three members of the Commission, who are appointed by the Governor with the consent of the Senate. By statute, one member, who by reason of previous activity and interest represents the public, must be licensed to practice law in Missouri. One of the other members is classified as a representative of the employer and the other as a representative of the employee. One of these three Commissioners is designated as the Chairman by the Governor.

Unlike the second level unemployment insurance authority in a majority of the states, the Commission does not specialize in appeals from decisions made by the unemployment insurance agency. In addition to the unemployment insurance appeal function, the Commission is also the appeal authority for workmen's compensation claims and prevailing wage cases, and, as stated in the Annual Report of the Missouri Department of Labor and Industrial Relations:

> The Commission in its day to day operations is also involved with wage collection, improper discharges, child labor, hazardous occupations, occupational health and safety on a national as well as state level, the accumulation and compilation of statistical material requested by particular agencies, both state and federal, the compilation, assimilation and composition of draft legislation related to labor and industrial relations, and, among other things, the continuous examination, collection, and when required, publication of laws and material related to labor and industrial relations.

The major portion of the Commission's time, however, is devoted to its appeal function in unemployment insurance and workmen's compensation, the larger portion to the unemployment insurance function.

The Commission's staff, because of its variety of duties, is provided from different sources. An employee of the state's unemployment compensation agency is located in the Commission's office and is primarily responsible for the receipt, notice, docketing, filing, and the processing and mailing of completed decisions. An attorney, assigned by the unemployment insurance agency, provides legal advice and assistance in the preparation of written decisions. The Commission's own counsel also provides assistance, as needed, and within the limits of the time that can be spared from other activity.

Work Load

The Commission's unemployment insurance work load over the past nine years has varied from a low of 1,114 single claimant appeals in 1974 to a high of 3,378 in 1979, which was 2.5% of the national total.

Processing Appeals

Most appeals on unemployment insurance cliams are filed in local offices of the unemployment insurance agency. Some may be received by mail at the Commission's office or at the office of the lower appeal authority. Requests for Commission appeals are sent through the office of the lower appeal authority, for which the Commission does not have administrative responsibility. Notice of receipt is sent from that office and a copy of that notice or a listing of appellants who were sent such notice is usually the first notice to the Commission of the existence of an appeal.

Files of the unemployment insurance agency and records of the lower authority appeals decision are forwarded to the principal clerk at the Commission's office who dockets the case in preparation for review by the Commission. After the review is completed, clerical staff type and mail the decision and return the completed files to the unemployment insurance agency where they are placed in the agency's central files.

Individual Case Review

In the past the Commission members have utilized a screening and review process for assistance to the members in arriving at a decision. The present Commission does not consider such assistance appropriate. In past years, also, typed transcripts of lower appeal authority hearings were not requested for all appeals. At that time the lower level appeal file was forwarded to the Commission, but a transcript was not typed by the lower level unless a request for it was received from the Commission. The present Commission has decided to request a typed transcript for every second level appeal. At the time of the review, an adjustment had not been made to this additional work load requirement at the lower appeals level and several hundred appeals were backlogged awaiting a typed transcript.

When the file for an appeal is complete with transcript, the Commission begins its review. Each Commissioner reviews the entire record, with no assistance from a prereview analysis or summary. For each case, each Commissioner makes a notation to affirm, reverse, or remand.

Format of Decision

Affirmations are ordinarily made on a brief form of decision which, in effect, adopts the findings and decision of the first level decision. Notations indicating the Commission's intent to reverse or remand are sent to the counsel who prepares the necessary decision or order for consideration and approval by the Commission. Counsel also prepares written decisions involving affirmations when correction or clarification is indicated. The percentage of decisions disposed of by different forms is apparently in a state of change. In years prior to 1979, it appears that 90% or more of the decisions of the Commission were disposed of by the brief form of decison. However, in March 1980, approximately 58% of the decisions appear to have been adaptable to the short form. One-fourth of the Commission's decisions disposed of in March were remanded to the lower level appeal authority for a new hearing. The Commission disposed of 174 appeals in that month, but received 344 appeals, which left the appeals pending at the end of March at 1,134. This would represent a six-month backlog at the 174 rate of disposition.

Report 329-53
June 1980

NEW JERSEY

Organization

The New Jersey Board of Review is composed of three full-time members. The process of selection of members is unique in that Board members must be selected from New Jersey Civil Service eligibility lists subject to all the Civil Service provisions. The Board elects one member as chairman and one as vice-chairman. The Board is the second level appeal authority for disputes on claims originating with the state's Unemployment Compensation Commission including determinations regarding demands for refund of benefits paid while appeals have been pending. The Board is responsible for rules and regulations governing the conduct of hearings at both the second and the first appeal level, but it does not have administrative responsibility for the lower appeal staff.

Two major administrative groups serve the principal needs of the Board: a clerical group, under the principal clerk; and technical assistants, called referees, under the supervision of a supervising referee, who assist the Board in the review of appeals.

Work Load

In the past nine years the Board's work load of single claimant unemployment insurance appeals has ranged from a low of 3,535 in 1972 to a high of 6,260 in 1977. In 1979, the Board received 5,390 appeals, constituting approximately 4% of the national total.

Processing Appeals

The principal clerk is primarily responsible for the movement of appeals through the various processing stages. Appeals to the Board may be made directly to the Board or in the local offices of the New Jersey agency. In either case, the principal clerk receives the form or letter by mail. If the intent of the letter is not clear, a letter is directed to the sender to determine if an appeal was actually intended. When appeal is clearly intended, the clerk prepares an out card for the Board's file and sends a request to the lower level appeal authority for the decision and records of the first level appeal hearing. When the records and taped recording of the first level hearing are received, appeal numbers are assigned, the appeal is docketed, necessary notices are sent, and a review sheet is prepared. The appeal is then sent to the Board's review staff.

Individual Case Review

The review sheet which accompanies the appeal file to the review staff serves a number of purposes. Check blocks are included by which local office files, which are not obtained for every case, or other information needed for a particular appeal, can be obtained. The form may be checked to order a typed transcript on a selective basis since most of the reviews are accomplished by listening to a taped recording of the hearing. When used for these purposes it is sent with the file to the principal clerk who retains control until the requested items are received and returned to the reviewer.

The review form also includes check blocks by which the reviewer can recommend the most commonly recurring dispositions, i.e., affirm first appeal, remand to the first level, or prepare a detailed written decision.

Space is provided on the review form for the reviewer to explain the proposed disposition for consideration by the Board. There is no single procedure for handling appeals involving first impression or policy decisions. Board member offices are in immediate proximity to the reviewer offices and Board members discuss many cases with reviewers and with each other. This appears to be the most frequent method of deciding on the disposition of important or difficult cases.

A number of hearings are conducted by the Board, a relatively large number compared to other second level appeal authorities. These hearings are conducted in local areas all over the state, usually where the claim was filed. A Board member or a designated member of the review staff ordinarily sits as a single hearings officer. Testimony is recorded by a reporter. The Board member or reviewer (referee) who conducts the hearing prepares a recommended decision which is submitted for review and consideration for approval by each Board member.

The review form includes check blocks for recommending a Board hearing and for noting name and address of witnesses for whom a subpoena should be issued when the hearing is scheduled. Cases thus identified are returned by the review staff to the principal clerk and are entered on an inventory of cases to be heard. For the week of Monday, March 24, 1980, the inventory included 58 appeals to be heard by the Board in 25 different localities in the State. When cases are selected from this inventory by a Board member to be scheduled, notices are sent to the parties, requests for subpoena are made, and a weekly hearing calendar is prepared. For the week ending March 10, 1980, hearings were scheduled for the Chairman on two days, for one member on two days, and for the other on one day. Hearings were scheduled for two days for two referees on the appeal staff. In all, 24 hearings were scheduled for hearing in eight localities.

Important or first impression cases are scheduled for Board hearings. The basis for selection of other cases is not by precise rule but by a more subjective judgment on the part of the reviewer that a Board hearing would serve better than a remand for rehearing by the first appeal level. Cases deemed to need further hearing but not requiring a Board hearing are remanded to the first appeal level for the hearing.

Format of Decision

Written decisions, detailing the Board's findings, opinion, and conclusion, are prepared for each appeal when a Board hearing has been conducted. Similar decisions are written for appeals decided on a review of the record when the first level decision is reversed or modified. A majority of the decisions which affirm the first level decision or are based on jurisdictional issues are made on standardized form decisions. The Board utilizes fifteen variations of form decisions. The most commonly used states that the facts and allegations have been examined and that there is no valid basis for further hearing or for changing the decision of the first level.

Report 329-55
June 1980

NEW YORK

Organization

The second level appeal authority in New York is vested in the New York Unemployment Insurance Appeal Board. The Board consists of a chairman and four additional members. They are appointed by the Governor for terms of six years.

The Board is responsible for the decision making function for second level appeals, and is responsible for the administration of both the second level and the first level appeal staff. The manager of the first level activity is responsible to the Board and reports directly to the Board Chairman who must devote substantial amounts of time to administration of both appeal levels.

The Board's principal officers for managing the second level appeal activity are an Executive Secretary and a Supervising Legal Analyst. The latter is responsible for a staff of lawyers, called Legal Analysts, who are the principal resource for the pre-decision review of appeals. In addition there is provision for an Administrative Assistant who is responsible for reviewing jurisdictional issues.

Although not specifically a part of the Board's organization, there are facets of the Industrial Commissioner's organization that have a significant impact on the Board's work. The Industrial Commissioner in the New York State Department of Labor is responsible for the unemployment insurance functions in New York other than the appeal functions assigned to the Board. Most state laws authorize participation by the unemployment insurance agency in appeal hearings and permit the agency director to appeal first level appeal decisions to the second level. In most of the states this activity is minimal. In New York the Industrial Commissioner has a staff specifically for the purpose of participation in the appeals system and this activity is reflected in the appeals filed to the Appeal Board. In 1978 more than 9% of the appeals to the Board were made by the Industrial Commissioner. In that year there were 1,461 such appeals which represented 72% of all such appeals filed in the nation. The Board reversed the decision of its first level authority and restored the original decision of the Industrial Commissioner in almost half of the cases.

Work Load

The New York Appeal Board processes by far the largest appeal work load of any second appeal authority. In recent years the number has ranged from a low of 7,500 in 1971 to a high of 19,926 in 1977. In 1979 there were 13,372 appeals which was approximately 10% of the national total.

Processing Appeals

Because the Board is the single point of administration for both appeal levels, some processing units serve both. Appeals to the Board are received in a receipt and control unit where case numbers are assigned. The files unit forwards the file containing the records of the first level appeal hearing and decision. A case preparation unit prepares an instruction to the typing pool identifying the kind of notice of appeal to be sent to the parties and whether or not a transcript of the lower level hearing should be typed.

A transcription unit in the typing pool prepares typed transcripts of lower authority hearings that were recorded on cassette tapes. There is a continuing stand-by contract arrangement with a private firm for use when the transcription unit needs assistance to keep pace with the work load. Transcripts prepared under this contract are usually ready within one week. There is also a hearing reporter unit that prepares typed transcripts when the lower authority was recorded by a reporter.

A docket unit is a principal control point for controlling the flow of appeals under consideration by the Board. This unit retains appeal files until transcripts or briefs are received. It maintains the docket and locator cards identifying the status and location of all appeals files. When the appeal folders contain all items necessary they are made available to the Executive Secretary and the Supervising Legal Analyst for consideration by the Board. The folder includes a Time Lapse Record form with spaces for entering when various processes are completed.

Individual Case Review

As a part of the review process jurisdictional matters are screened and selected for consideration of an Administrative Assistant. This person handles all requests for reopenings of cases and prepares decisions for the Board's consideration for all denials of reopenings, withdrawals, and dismissals for untimeliness.

Assignment of other appeals for review is made by the Supervising Legal Analyst or the Executive Secretary. Cases may be assigned directly to a Board member for the initial review or may be assigned to the Board's review staff. This staff of lawyers, (legal analysts), under the supervision of the Chief Legal Analyst, is divided into teams, with a team consisting of five analysts being assigned to each of the Board members. At the time of the review, recruiting and other problems had prevented complete staffing of the six teams that are in the current plan. To keep the process moving lawyers from the lower appeal authority are used on a temporary basis from time to time.

When a case is initially reviewed by a Board member, the decision is directed by the Board member. If the case is reviewed by a Legal Analyst, a decision based on that analysis of the issue will be prepared, reviewed by a Senior Legal Analyst and submitted to a Board member for consideration and approval. If approved, the file and decision are submitted to a second Board member. Approval of two members is sufficient for a decision. A third member reviews when there are differences. If a third member indicates a desire to enter a dissenting opinion the matter is reviewed by the entire Board.

The Board is authorized to conduct hearings. Either a Board member or a Legal Analyst can recommend an appeal for a Board hearing. Board members regularly hear some cases; although, because of time limitation, it is an insignificant percentage of the total. Ordinarily one Board member serves as a single hearing officer. The processing of decisions based on a Board hearing is similar to that for decisions based on a record review. The decision prepared at the direction of the Board member who heard the case must also be approved by another member of the Board.

Report 329–57
June 1980

Format of Decisions

Most of the Board's decisions denying appeals involving jurisdictional matters are completed by use of standardized form decisions, covering matters of timeliness, requests for rehearing, nonappearances, and withdrawals. These can be completed by inserting dates, names, and numbers that identify the matter with the first level decision under review.

A short form decision is also used in a large percentage of cases that involve an issue but require no reversal or modification of the first level decision. These are cases where the appeal has raised no issues that were not considered at the first level hearing, there was no breach of due process at that level, the evidence supports the finding, and the law has been properly applied within the established policy and precedent. A form decision is completed for these cases by entering dates, names, and numbers that identify the lower level appeal under consideration and, stating that there were no errors, adopts the findings of fact and opinion in that decision.

Report 329–59
June 1980

RHODE ISLAND

Organization

The higher level appeal authority in Rhode Island is the Board of Review. The Board is composed of three members, each appointed by the Governor to serve for six years. One member represents employees, one member represents employers and one member represents the people. The representative of the people serves as Chairman, and the Chairman must participate in each decision. Rhode Island statutes do not require the members of the Board to be attorneys, and none of the current members are attorneys. The members work full time.

The Board of Review does not handle appeals for the WIN program, but does receive appeals for the State's Temporary Disability Program.

The Chief of Referees, the head of the Lower Authority, also functions as the Board's head administrative officer. Because the Board and Appeal Tribunal occupy the same floor of an office building, the Chief of Referees is able to divide his attention between both bodies. The Board currently has two part-time attorneys. Both operate independent law practices in addition to their Board work, and they, theoretically, provide one-half of their time to the Board of Review. In fact, their Board activities consume well in excess of twenty hours per week.

The principal job duties of the attorneys may be divided into three main categories. First, the attorneys are responsible for certain aspects of the decision making process by the Board. This includes preparing for cases which are set to be formally heard by the Board and must be presided over by one of the attorneys. Also, the attorney must dictate the opinion in all of the cases. While this requires little effort in the great majority of cases wherein the decisions are done by form, mostly affirmances, all reversals or new findings of fact or conclusions of law must be completely drafted by the attorney. In addition to drafting opinions and presiding over hearings, the attorneys must advise the board members from time to time upon particular questions relating to a given case. This often requires legal research.

The second major function of the Board attorneys is to provide advice and information to the Appeal Tribunal Referees. This is a novel formal practice, not found in the other sample states. The obvious use of such a practice is to allow the referees to question the attorneys about a particular case then pending. However, above and beyond this, the attorneys are to provide continuing information regarding the most recent court cases in the area. Recent Board decisions may also be discussed.

Lastly, the Board attorneys are responsible for representing the Board and all actions further appealed to the court's system. In Rhode Island this may involve three levels of appeal within the state's courts. In 1979, 106 Board decisions were appealed to the courts. In 1978, 58 decisions were appealed to the courts. Each level of court appeal requires writing briefs and may also entail oral argument in addition to the other normal court appearances that must be made. This one item consumes much of the attorney's time.

Another Board staff member is a Stenographer, who makes the formal record of the Board hearings for appeals to the District Court. One other individual functions as a clerk-receptionist. The Board and the Appeal Tribunal share a Docket Clerk. Other individuals involved in Board activities include the secretaries of the respective Appeal Tribunal Referees. The sec-

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retaries prepare the transcripts of the hearings conducted before the tribunal for Board review.

Work Load

The Rhode Island Board of Review has a relatively light work load. From 1971 to 1979 the number of single claimant appeals filed annually ranged from a low of 232 in 1973 to 631 in 1978. In 1979, 592 such appeals were received. During the nine-year period, the percentage of affirmations issued by the Board has steadily increased. While 23.3% of claimant appellants were successful in 1971, only 10.5% of the claimant appellants were successful in their appeals in 1979. Likewise, while 56.5% of employer appellants prevailed in 1971, only 33% contained reversals in 1979. As with other states, the Rhode Island case load seems to be steadily increasing.

Processing Appeals

Appeals to the Board of Review are received in one of three ways. The appealing party either appears at the local office of the agency and fills out a printed appeal form or the appeal is mailed directly to the Appeal Tribunal or directly to the Board of Review. When an appeal is received by the local office or the Appeal Tribunal, it is forwarded to the Board of Review.

Board of Review cases retain the docket number assigned to them by the Appeal Tribunal. Each case is referenced by the year of filing, alphabetical designation and its chronological position in that year. Only the alphabetical designation is changed to indicate that it is a Board case. In other words, 80-BU-575, shows that the case was originally filed with the Appeal Tribunal as an appeal from the agency in 1980 and was the 575th appeal so filed that year. The BU indicates that the case is currently before the Board. However, the yearly date does not have definite meaning in relation to when the case was filed with the Board, nor does the chronological designation. While such a system of docketing does not give an individual case a specialized informative Board identity, it does promote continuity in the appeal process through uniform filing designations.

When the Board receives an appeal, the appeal is initially reviewed to determine whether or not the appeal may probably be resolved without the necessity of a formal hearing before the Board. This is done by the Chief of Referees, acting in his capacity as Board Administrator. Factors considered are whether or not all parties appeared and presented evidence before the Appeal Tribunal, whether or not the parties were represented by counsel, whether or not new factual or legal issues are being presented in the appeal to the Board, and whether or not any procedural defects occurred below so as require further hearing.

Individual Case Review

If it is initially determined that no formal hearing is required before the Board, the next two steps occur simultaneously, in theory. First, a letter notifying the parties that the appeal has been received by the Board is prepared and sent to the parties. This form letter informs the parties that if they have further information to submit to the Board they should do so within ten days. At the same time, the transcript of the hearing before the Appeal Tribunal is requested. In this manner the ten-day notice period should expire at approximately the same time that the transcript is returned to the Board. It is noted that, from the cases analyzed, there is seldom any response to the Board's notice of receipt of appeal. After the transcript is prepared, a single case file is prepared and circulated among the various Board members to review the file and note on a form attached to the cover whether their decision is for affirming, reversing or modifying the decision of the Referee. If, at any time during the review, a Board member feels that a case not previously scheduled for hearing should be so scheduled, the case is then withdrawn from the review procedure and set on the hearing docket for formal hearing. After a case which will not be set for hearing is reviewed by all members of the Board, a staff attorney is able to prepare an opinion according to the separately marked form attached to the file folder. In the case of a two to one decision, the dissenting member may choose to have a formal dissent published. The dissent is prepared by the same attorney who prepares the majority opinion.

As noted, the Board of Review does conduct formal hearings in a great number of the cases before it, said hearings being set for a variety of reasons. When it is determined, for whatever reason, that the case is to be heard by the Board at a formal hearing, a transcript of the hearing before the Appeal Tribunal is requested and the case is placed on the Board's hearing docket. Because Board members work on a full-time basis, formal hearings are regularly scheduled for the Board. Either one of the attorneys or the Chief of Referees sits with the Board at the formal hearing and presides over the hearing. One of the attorneys drafts the decision at the Board's direction.

Unless the agency has specialized knowledge relating to a particular case, such as in a situation involving overpayment of benefits, the agency is not normally represented before the Board, although it does have the right to appear as a party before the Board.

The Board's stenographer is present at all hearings to operate the electronic recording machine which makes the official record of the case. All members of the Board are normally present for each hearing. The Board attorney or Chief of Referees who conducts the hearing must be familiar with the record in the case, and it is noted that the individual Board members familiarize themselves with the prior record in each case before the hearing. Board members' participation in a case is normally limited to asking a few questions after all of the evidence is presented. The Board members keep a form sheet for each case which has the basic information on it and columns for summaries of evidence presented to the Board. The Board utilizes these forms and is familiar with each of its cases. Each decision of the Board is, therefore, a decision of the full Board. There are no one-person decisions in Rhode Island.

Decision Format

Decisions of the Board of Review are brief. The vast majority of affirmances are printed form decisions. Further, all jurisdictional decisions are issued on printed forms. As with other form decisions encountered, the decisions make no reference to the facts of an individual case. It is only when the Appeal Tribunal is reversed or modified that the Board makes significant findings of fact or conclusions of law. These decisions are normally limited to less than two pages, being relatively brief and to the point.

Sample Statistics

Sixty 1979 Board of Review cases were randomly selected for a sample study. Of those cases 55% involved the issue of voluntary job separation, 21% involved job separation resulting from discharge, and 16.7% involved a question of eligibility due to availability for work or efforts to find work. A few cases considered other issues. It is noted that no jurisdictional issues were included in the population from which the sample was drawn. Each of the cases was a case involving the merits of a particular issue. For this reason, the time periods will be somewhat larger than average. The cases sampled averaged 87.6 days from the date of filing of the appeal to the date that the decision was mailed to the parties. The time period from the date of filing of the appeal to the receipt of the type transcript of the record of the hearing before the Appeal Tribunal averaged 40.7 days. In those cases, sampled which involved a formal hearing before the Board of Review, the hearing was conducted, on average, 84 days after the appeal was filed.

The Rhode Island Board of Review does not keep extensive in-processing date records on its cases. The items noted above are not set out as the only critical dates used, merely those available.

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June 1980

UTAH

Organization

The second level authority in Utah is the Board of Review. The Board is a part-time body composed of one of the state's industrial commissioners, one member who is a representative of employers and one member who is a representative of employees. The Board is appointed by the Governor. The Board is paid only for days worked and then at a rate of $25 per day. The Commissioner is Chairman of the Board. Statutes provide that each case must be decided by the full Board.

One individual is designated as Secretary to the Board. That individual performs clerical and administrative duties for the Board. The Secretary supervises the typists who work for both the Board and the Appeal Tribunal. These typists prepare Board decisions and also perform other clerical functions. A private contractor is used to type transcripts of Appeal Tribunal hearings for all appeals. The Chief of Appeals perform some administrative duties for the Board, such as signing notification letters to the parties that an appeal has been received. One of the department's attorneys is also assigned to the Board of Review and devotes approximately 30% of his time to Board work. This individual analyzes cases and prepares decisions in the cases.

Work Load

Utah has a very light case load. In recent years it has ranged from 55 appeals filed in 1971 to a high of 274 appeals filed in 1977. In 1979, 245 cases were filed. Aside from the nature and dispersion of the population and work force, another factor may enter into this light case load. Utah employers are not taxed on an experience rating system. They simply pay a proportion of their gross payroll as unemployment tax. That proportion neither rises nor falls in relation to the number of their former employees who have drawn benefits. Because employers have no financial stake in the outcome of a first level appeal, or any particular reason to further appeal a decision in favor of a claimant, fewer appeals reach the Board of Review. Employers simply have no reason to be litigious.

Processing Appeals

As in other states, there is a lag time between when an appeal is filed and when it is received by the Board of Review. After receipt the Board issues a notification to the parties acknowledging that receipt has been made and that a decision will be forthcoming. At that time, the transcript is requested along with other relevant documents from the Appeal Tribunal and the Commissions' computers. After the transcript has been received, a copy is mailed to each Board member shortly before the members meet to confer about the case. Utah law prohibits a formal evidentiary hearing before the Board. However, approximately once a week the members get together in private conference to reach decisions in approximately 10 cases. After the decision is reached, the attorney for the Board will prepare a decision in accordance with the desires of the Board. That decision is then processed and mailed to the interested parties.

The Board has a standard set of forms, similar to those in other States, which it uses to prepare and process a case through the system.

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Individual Case Review

As noted, each of the Board members receives a transcript of the hearing conducted before the Appeal Tribunal in every case. Each member becomes thoroughly familiar with the record prior to the meeting of the board members. At the meeting, each member is present along with the attorney for the board and a secretary to record notes. The members proceed through a discussion of each case until agreement is reached as to the outcome in each case. Board members need not be attorneys under Utah law, and tend to operate with a general feel for the equities in the cases as opposed to technical legal theories. As noted, the Board attorney prepares the actual opinions after the Board has concluded its conferences.

Decision Format

Most Board decisions are one-page decisions and many are form decisions, particularly those involving the issue of the timeliness of an appeal or a simple affirmance. Even in cases where a lower decision has been reversed or modified, the opinion seldom makes new complete findings, but usually refers to the particular point or points that were determinative in the Board's decision. For this reason, the decisions must be read along with the decision of the Appeal Tribunal to understand the full impact.

Sample Statistics

A large random sample of 1979 appeals was examined to determine the relative time consumption by the various stages of the Utah appeals processing system. The results are as follows.

Processing Step	*Average Number of Days To Complete*
Appeal filed to receipt by Board	2.7
Receipt of appeal to receipt of completed transcript	23.3
Receipt of transcript to transcript mailed to members	11.9
Transcript mailed to members to hearing	10.4
Hearing to publication of decision	9.4
Total	57.7

All of the cases which were filed in 1979 and decided by the middle of February 1980, were disposed of by the following percentages.

Disposition	*Percentage*
Affirmed	65.0%
Reversed	16.1%
Modified	9.9%
Dismissed	6.3%
Withdrawn	2.2%

While the figure of 26% of the cases which were either reversed or modified would appear to be somewhat high, it may be accounted for by the fact that employers seldom participate in appeals.

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June 1980

WASHINGTON

Organization

Washington's statutes do not provide for a separate board to review appeals from the decisions of the Appeal Tribunal. This function is specifically granted to the Commissioner. The Commissioner is the administrative head of the Employment Security Department, and the duties of running the agency allow little time for personal review of all second level appeals. For this reason, in 1976, with approval of the Attorney General's office, the Commissioner delegated this responsibility to an Employment Security Review Office. Since that time, the Commissioner has had little personal involvement in the reviewing procedure.

The Review Office consists of eight separate Deputy Review Officers. Each Review Officer is a licensed attorney. While one of them is, in fact, the general supervisor and in charge of the office, he or she is not designated by any particular title such as Chief Review Officer.

Support personnel consist of one individual who performs the duties of an office administrator/clerk, one docketing clerk, and two clerk stenographers.

The number of Review Officers is not fixed in number. Because the Review Office owes its existence to the Commissioner's administrative delegation of power, the size of the office is established by, and may be changed by, administrative fiat. In this regard, the Review Office closely resembles that of Minnesota and other states. It is thereby possible to make the system responsive to an ever-changing case load by varying the number of Review Officers.

Work Load

Between 1971 and 1979 the number of appeals filed before the Review Office ranged from a low of 814 in 1971 to a high of 2,588 in 1979. The case load showed a steady and constant increase during each of the intervening years.

Processing Appeals

An appeal to the Review Office is filed when it is postmarked or received by the agency, whichever occurs first. While an appeal is "by petition," no particular form is required. Appeals may be made by direct mailing to the Review Board of the Appeal Tribunal at its central location, or an appealing party may file an appeal at any local office of the Department. The Department provides a form for all appeals, but if an appeal is not filed on the prescribed form the information is transferred to the form by the Review Office or the Department. The form is multi-carboned, and copies are transmitted to all interested parties, including the appellant, by the Review Office. The form provides notice that the appeal has been filed and that any further written input must be received within 20 days.

The Review Office conducts no formal hearings. If it is determined that further evidence is necessary to the proper disposition of a case, the case is remanded to the Appeal Tribunal. While a case could be remanded for the taking of evidence only, all cases are remanded for the taking of further evidence and the issuance of a new decision by the Appeal Tribunal, although the result is not directed by the Review office.

No oral argument is permitted before the Review Office. As a matter of practice and courtesy, if a party requests time to present written argument to the Review Office, such request is granted.

The record before the Appeal Tribunal is not transcribed, but the cassette recording of the hearing is transmitted to the Review Office. The only time that the record will be transcribed is if the case is appealed from the Review Office to the courts. If, while a case is pending before the Review Office and before the decision is rendered, a party desires a copy of the record, a physical copy of the cassette recording is made and given to the party. All local offices have cassette recorders so as to give any party the ability to play back the duplicated record.

If an appeal has been transmitted to or through the Appeal Tribunal offices, the case file will accompany the appeal to the Review Office. Otherwise, when each appeal is received by the Review Office, the Appeal Tribunal is notified by telephone that the case has been appealed and that the file should be forwarded to the Review Office. Due to the Appeal Tribunal and Review Office having locations several miles apart, the file of a case may not be transmitted from the Appeal Tribunal and received by the Review Office for from two to five days under current procedures. After the file has been received and all parties have been given notice, the file is placed in a cabinet in the chronological order in which it was received. When a Review Officer completes the case that he or she is currently reviewing, the oldest case in the cabinet is next taken without regard to any particular designation as to a specific Review Officer. In this manner of "case pooling," no Review Officer can build a backlog of cases and all cases are disposed of on a first-in, first-out basis.

After the final draft of a decision has been prepared and signed by the appropriate reviewing officer, it is taken to the department's offset printing room. These facilities are shared with other divisions of the department. The opinions are normally allowed to accumulate until a group is ready for copying by the offset printing department. In this manner upwards of 20 decisions may be returned to the Review Office by the printing department on the same date. Those 20 opinions may have been held by the offset department for anywhere from two days to several weeks. After printing, the decisions are issued.

The Washington State Attorney General handles all appeals of Review Office decisions.

Individual Case Review

When reviewing a particular case, the Review Officer listens to the cassette recording of the hearing conducted by the Appeal Tribunal Referee and reads all other documents which are in the file and are part of the official record. After a decision is drafted, by longhand, dictation, or typing, the file and the draft are placed on a table for the stenographer to type a rough draft of the decision. The rough draft of each decision, along with its accompanying file, is then circulated among all of the Review Officers for further input. After all problems with any decision have been resolved and all corrections noted, the final draft of the opinion is prepared, signed by the issuing Review Officer, sent to duplicating for the production of 20 offset copies, and mailed.

An exception to the above-described procedures exists for cases involving jurisdictional issues such as timeliness either to the Review Office or to the Appeal Tribunal. Also in this category are situations wherein an individual does not appear at a scheduled hearing before an Appeal Tribunal, has an adverse default decision issued and appeals to the Board of Review alleging reasons for the non-appearance. These cases are automatically handled by the head Review Officer and do not follow normal processing procedures.

Decision Format

While Review Office decisions are somewhat short and to the point, they normally make the determinative findings and conclusions in a clear and understandable manner. The Review Office uses a memory typewriting system so as to utilize recorded "form" decisions when the situation dictates. It is often found that the decision of the Appeal Tribunal sufficiently describes the facts so as to allow that decision to stand for the Review Office. In such a case, a form with gaps for certain jurisdictional facts is used to adopt the findings and conclusions of the Appeal Tribunal. It is noted that by using a memory typewriter the machine is able to produce a decision which appears much more personalized than a printed form decision with blanks typed in. This type of form and manner of reproduction provides additional flexibility, in that in situations requiring minimal additional findings and clarifications by the Review Office, material of varying lengths may be inserted in the form without leaving gaps or destroying the continuity of the decision.

During the calendar year of 1979, the Review Office used a simple one-page form decision in approximately 23% of its cases. While the form decisions referred to here all involve cases addressing the merits of the appeal, jurisdictional type cases, previously described, often lend themselves to short form opinions. These jurisdictional cases amounted to approximately 23% of the cases disposed of in 1979. Because some of the jurisdictional cases are addressed at length in Review Office decisions, less than the 23% figure would include the short form disposition opinions in that category. It is believed, therefore, that approximately 40% of the Review Office decisions are summary in nature.

The nonsummary decisions fall into one of two categories, with the line of demarcation between them somewhat vague as regards form and length. In the first category, the findings and conclusions of the Appeal Tribunal are adopted by the Review Office with further explanation in the decision. As noted above in reference to memory-typed form decisions, these additional findings may be brief or lengthy as befits the individual case. Some decisions were found which, while adopting Appeal Tribunal decisions, had additional findings longer than those made in some Review Office cases where the office issued its own new findings. While this form prevents redundancy in areas wherein the Review Office agrees with the Appeal Tribunal, such decisions must be read together with the decision of the Appeal Tribunal in order to clearly understand the meaning of the decision.

The final category of decisions issued by the Review Office is the decision which makes entirely new findings of fact and conclusions of law, adopting none of the decisions of the Appeal Tribunal. It is noted that these decisions vary substantially in length.

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Review Office decisions are typed on standard-size paper (8½" x 11"). Most of the decisions which do not involve entirely new findings and conclusions by the Review Office are double spaced, while most of the decisions including all new findings are single spaced. Excluding jurisdictional cases and cases decided by one-page form decisions, Review Office decisions averaged 2.9 pages during 1979.

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Report 329–69
June 1980

Cross-Examination (Scope of and by Lay Persons)

Robert L. Smith

The first question I will consider is whether the provision for cross-examination in the Missouri Administrative Procedure Act, Chapter 536, RSMO 1978, applies to hearings conducted under the Missouri Employment Security Law. The commentary by Richard Shewmaker at 37 VAMS 165 states that the four sections (sections 536.060—536.090) relating to procedure apply to all agencies, and the procedural provisions in the particular statute establishing an agency remain in force to the extent not inconsistent with chapter 536. In case of conflict, chapter 536 governs. Under this view, the APA's procedural requirements would clearly apply to unemployment insurance hearings.

For a different view, see *State ex rel. Utility Consumers Council of Missouri* v. *Public Service Commission*, 562 S.W.2d 688 (1978). The court said:

> The right to cross-examination in administrative proceedings is governed by Sec. 536.070(2), which provides that:
> Each party shall have the right to call and examine witnesses, to introduce exhibits, to *cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination*, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. (Emphasis added)

In a footnote, the court said the procedures delineated in chapter 536 for a hearing apply unless a contrary provision exists in chapter 386, the statute establishing the Public Service Commission. Under the view in this case, it could also be reasoned that the procedural requirements for cross-examination in the APA could apply to UI hearings.

Section 288.190.3 requires the division to give a "fair hearing." Implicit in the requirement of a fair hearing is the right to cross-examine. For a general discussion touching on this point, see 2 Am. Jur.2d, Adm'v Law, section 424, 73 CJS, Section 127, Witnesses. There is no other provision in chapter 288 or the regulations of the division concerning the right to cross-examine. Thus, there is no provision in the Missouri Employment Security Law contrary to section 536.070(2), and it could be concluded that this section applies to hearings conducted under the Missouri Employment Security Law. For the sake of further discussion, I assume that the scope of cross-examination in UI hearings is delineated in section 536.070(2).

Section 536.070(2) permits cross-examination on any matter relevant to the issues. For the most part, the issue in each case is clear. Occasionally, the issues are fixed as a matter of policy, as in the case of able and available. Presently able and available is not usually an issue unless it is raised by the deputy's determination. There have been other occasions, however, when we have considered issues of fact or issues of law not included in the deputy's determination. In the absence of express policy or regulation, what standard is applied to fix the issues? If we have appellant jurisdiction, we can review only the issues established by the proceeding before the deputy. On the other hand, the referee is obligated to try the case anew or de novo if his jurisdiction is general. For a case holding that a hearing before a UI board of review is, in effect, a hearing de novo, see *Charles Smarr* v. *Board of Review*, W. Va. CCH, paragraph 8193. See also *Pizura* v. *Director*, 231 Mass. 286, 118 N.E.2d 771 (1954). It is reported in CCH at paragraph 2020.67 as holding that no restriction is placed on the scope of the hearing before the board, and it is not bound by a previous finding of the director or his representative.

I will not attempt to resolve the standard which is applied in determining the issues, but will only mention one particular matter that occasionally occurs in my hearings. In some hearings, there is an attempt to cross-examine a party on a sentence written in the determination that is favorable to the party testifying. I usually stop such an examination if the party did not bring that matter up on direct examination. As a precaution, I ask the party if he intended to raise that point. If he did not, further cross-examination on that point is stopped. My approach to this particular problem is, therefore, to treat the proceeding as a hearing de novo.

Section 536.070(2) obviously does not afford an unlimited right to cross-examine. The cross-examination must be relevant to the issues. This section also affords the right to impeach any witness and this right has traditionally been treated as a part of cross-examination. The right to impeach permits cross-examination to go beyond those matters that are relevant to the issues.

Consider first what limitations can be placed upon cross-examination on matters relevant to the issues. Cross-examination that is repetitious, nonproductive, and a waste of time may be restricted. *The Denver Symphony Association* v. *I.C.*, Colorado CCH, paragraph 8314. The agency is allowed discretion in precluding cross-examination on marginal or remote issues. *Communist Party* v. *Subversive Acts Control Board*, 367 U.S. 1, 6 L.Ed.2d 625, 81 S.Ct. 1357. This case is cited at 2 Am. Jur.2d, Adm'v Law, section 424.

Cross-examination designed to impeach a witness may have nothing to do with the issues, but is admissible because it will be useful to appraise the credibility of a witness. These questions will be designed to impeach the veracity, capacity to observe, impartiality, and consistency of the witness. Generally speaking, you have broad discretionary power with respect to placing a limitation on cross-examination designed to impeach. McCormick on Evidence, 1972, p. 49.

I have made a random selection from the Missouri Digest on cross-examination with respect to two problems. Questions on cross-examination that are argumentative, call for a conclusion, or assume facts go beyond the scope of proper cross-examination. For example, our hearings sometimes test veracity with prior inconsistent statements such as the claimant's written statement, protest letters, resignation letters, etc. After establishing prior inconsistent statements, frustration tends to evoke questions such as, "Which is correct?" or "Which is right?". Such questions have been held to be improper cross-examination because they are argumentative. *Eddings* v. *Koller,* 400 S.W.2d 164 (1966). Ordinarily a witness who reads a document to refresh his recollection of an occurrence must permit the cross-examiner to read the document. A Missouri court has held, however, that a referee did not abuse his discretion when he refused to require the document to be produced, because the cross-examiner did not demonstrate that the requested document would impeach the testimony of the witness. *Rose* v. *State Board of Registration for Healing Arts,* 397 S.W.2d 570. The problems that can occur as to the restrictions that can be placed on cross-examination and impeachment of witnesses are numerous, and I have not attempted to deal with all of them here. . . .

The scope of cross-examination is not varied for a lay cross-examiner. As long as a lay party is interrogating on matters relevant to the issues, there is no need to interfere. I do not permit the lay cross-examiner to interrupt the questioning to give testimony. This only causes arguments between the parties and prolongs the hearing. The referee "is not required to sit idly by and permit a confused and meaningless record to be made." Vol. 2, section 10.02, Administrative Law Treatise, by Kenneth Culp Davis, 1958 ed., quoted from *Bethlehem Steel Company* v. *NLRB*, 120 Fed.2d 641, 652 (1941).

If necessary, a referee must take over the examination for the lay cross-examiner. Unemployment compensation statutes attempt to simplify procedures so that the parties may present their claim without the expense of obtaining legal counsel. The Missouri law is no exception. It permits hearings to be conducted in accordance with the regulations of the division, whether or not such regulations conform to the common law or statutory rules of evidence and other technical rules of procedure. section 288.190.2. The division's regulations permit the appeals tribunal to examine all parties and witnesses. 8 CSR 10-5.010(8). Thus, a referee has a legal right to take over cross-examination for a lay party. In some States, he has an express legal duty to take over the cross-examination. A claimant seeking unemployment compensation was denied a fair hearing when the referee gave no assistance to the claimant in examining and cross-examining witnesses as required by the board's regulations. *Lawrence* v. *Administrator*, Ohio CCH, paragraph 1970.55, 202 N.E.2d 703 (1964). A referee may properly make a "Searching Cross-examination." *Jew Ngee Guay* v. *Proctor*, 109 Fed.2d 355, 356 (9th Cir. 1940), but he should do so as an advocate for the party testifying. Where a court found that the examiner had gone too far, it also pointed out that, "We do not mean that an examiner is not free to, and should, interrogate witnesses when necessary to elicit or clarify testimony. What we do mean is that, when he does interrogate he should do so as an advocate endeavoring to establish one side or the other of the controversy before him." *Montgomery Ward and Company* v. *NLRB*, 103 F.2d 147, 156 (8th Cir. 1939). These cases were cited by Davis, *supra*.

Since the Southwestern Reporter system is not readily accessible to all referees, I will quote extensively from a Missouri case where the referee conducted an improper cross-examination. The Department of Public Health and Welfare appointed an attorney to act as referee and to submit the record to the commission for its decision.

> During the cross-examination of Dewey Jones by the referee, the following questions, answers, statements, objections and rulings occurred as shown by the record:
> *(The Referee)*
> Q. What is it, Mr. Jones, that prevents you from working now if you wanted to work? What is it that prevents you from working if you wanted to?
> *Mr. Devoy*
> I object to that double-barreled question. You are assuming he don't want to do it.
> *(The Referee)*
> Q. No, I am not. I am assuming he wants to work. He says he has been looking for work.
> (The Witness) State your question.
> *(The Referee)*
> Q. In other words, looking at you, Mr. Jones, you look to be a normal person to me. You look of normal weight for a man of your height. You must be what, six feet tall, is that right?
> A. I am not quite six feet.
> *(The Referee)*
> Q. Well, as I said, to me you appear to be a normal person from my observation. What is it that prevents you from working if you wanted to work?

> *Mr. Devoy*
> I object to the observation made by the referee.
> *(The Referee)*
> The objection is over-ruled.
>
> The foregoing excerpt of the record shows that the referee made two statements of fact (as distinguished from interrogation) as follows: (1) "In other words, looking at you, Mr. Jones, you look to be a normal person to me. You look of normal weight for a man of your height." (2) "Well, as I said, to me you appear to be a normal person from my observation."
>
> Manifold vices inhere in the quoted comments: (1) They are unsworn statements of purported fact. (2) They are voiced demonstrations of bias against claimant. (3) They are expressions of the referee's opinion on the sole issue of fact and on the merits of the case. (4) They amount to an openly expressed pre-judgment of the controversy. (5) They tended to intimidate the witness Dewey Jones during his examination. (6) They tend to discredit or disparage the witness Dewey Jones and his evidence— as well as the evidence of all witnesses who testified to his incapacity for work. These deviations from official duty are not matters of form, but partake of vital substance. Each of the enumerated effects of the referee's impropriety is an invasion of claimant's right. Combined, they have defeated [claimant's] entitlement to a just determination.
>
> * * *
>
> . . . For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

Jones v. *State Department of Public Health and Welfare*, 354 S.W.2d 37 (1962). The last sentence quoted above may be the best standard I can give for determining how a referee may properly limit cross-examination. Apply a standard of fair play.

Report 329–73
June 1980

Miscellaneous

MS–375.05–55

Massachusetts B

Decision of Board of Review
April 3, 1979

BR-06700-A et al.

Receipt of other payments:
General

Miscellaneous 375.05

Employer disputed claimant's entitlement to unemployment insurance benefits without deduction for holiday pay; the benefits include payment for holidays before the accumulated work week ending November 25, 1978, but, by the terms of the union-management agreement, were scheduled to be paid during that week when the plant was shut down. In this week, claimant received 5 days of holiday pay, i.e., for Thanksgiving Day, the Friday that followed, and for Labor Day, Columbus Day, and Veteran's Day. *Held*, entitlement to benefits affirmed since, by statute, the 2 day's holiday pay (Thanksgiving Day and Friday following) could not be used to reduce benefits, and the 3 other days could not be considered "remuneration" since they were actually earned in the weeks in which the holiday fell, i.e., *not* during week ending November 25, 1978.

Findings of Fact and Reasoning

The employer's appeal is from a decision of the director, which found that the employer's facilities were closed during the week ending November 25, 1978; that said closing was in accordance with a union-management agreement that stipulated the accumulated holidays earned would be applied to the week of Thanksgiving; that all production workers so affected, including the claimant, received holiday pay for the aforementioned week; that the claimant was in total unemployment, during the week ending November 25, 1978, within the meaning of section 1(r)(2) of the Massachusetts Employment Security Law; that the benefits to which the claimant was entitled shall not be reduced by reason of the fact he received holiday pay so-called in accordance with section 29A of the law; and that the claimant is, therefore, eligible for benefits within the meaning of section 29(a) of said law.

Sections 1(r)(1), 1(r)(2), 1(r)(3), 29(a), 29(b), and 29A of the law are pertinent and provide as follows:

Section 1(r)(1): "Partial unemployment," an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded.

Section 29(b): An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed; provided, however, that earnings up to forty percent of his weekly benefit rate shall be disregarded. In no case shall the amount of earnings so disregarded exceed thirty dollars or be less than ten dollars. Such partial benefit amount shall be raised to the next highest dollar if it includes a fractional part of a dollar.

Section 1(r)(2): "Total unemployment," an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable of and available for work, he is unable to obtain any suitable work. . . .

Section 29(a): An individual in total unemployment and otherwise eligible for benefits shall be paid for each week of unemployment. . . .

Section 1(r)(3): For the purpose of this subsection, "Remuneration," any consideration, . . . as payment for vacation allowance during a period of regular employment. Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. . . .

Section 29A: The benefits to which an individual would otherwise be entitled under this chapter shall not be reduced by reason of the fact that such individual received holiday pay, so called, in any week of his total or partial unemployment.

The company normally worked a 5-day week, Monday through Friday. In February 1978, the union, in part, proposed a 4-day week, Tuesday through Friday. Each workday would consist of 9.5 hours, and employees would receive 40-hours' pay for working a 38-hour week. In addition, when a holiday falls on, or is celebrated on a Saturday, Sunday, or Monday, the employees shall be credited with a "holiday earned." "Holidays earned" shall be accumulated and shall be applied to the Monday, Tuesday, and Wednesday prior to the Thanksgiving holiday. The employing unit agreed to the proposals and, as a result of an affirmative vote by the employees, the proposals were included in the contract.

The employing unit, by custom, paid employees holiday pay for Thanksgiving, and also for the Friday that followed Thanksgiving. The union requested that employees be paid accrued "holiday earned" during Thanksgiving week, as follows;

Monday, November 20, 1978—Labor Day Holiday
Tuesday, November 21, 1978—Columbus Day Holiday
Wednesday, November 22, 1978—Veteran's Day Holiday

Thus, while employees would not be required to work at all during Thanksgiving week, they would receive, if entitled, 5 days of holiday pay. The employer testified that if it were not for the union proposal, work would have been available to all employees during the abbreviated workweek of Tuesday, November 21, 1978, and Wednesday, November 22, 1978.

After full review and consideration, the Board finds that the holiday pay received by the employees during Thanksgiving week for Labor Day, Columbus Day, and Veteran's Day cannot be considered "remuneration" within the meaning of section 1(r)(3) of the law, quoted above, since it was earned during the weeks in which the holidays fell, not during the week ending November 25, 1978; that since the employer paid the employees holiday pay for Thanksgiving Day and Friday, the day after, the Thanksgiving workweek would consist of 2 days, Tuesday, November 21, 1978, and Wednesday, November 22, 1978; that, although work was available, the plant was closed on those 2 days because the employer was told the employees did not want to work; that, while holiday pay cannot be used to reduce benefits within the meaning of section 29A of the law quoted above, the claimant cannot be considered to be in either total or partial unemployment, within the meaning of sections 1(r)(1) and 1(r)(2) of the law, quoted above, during a 2-day workweek he has chosen not to work; and that he, therefore, would not be eligible to serve a waiting period or receive benefits for such week within the meaning of sections 29(a) and 29(b) of the law, also quoted above.

Decision

The decision of the director is modified. Benefits are denied for the week ending November 25, 1978.

BOARD OF REVIEW
STEVEN D. KARCHMAR, *Chairman*
SAUL GURVITZ, *Member*
JAMES L. ST. AMAND, *Member*

READEX FICHE

Virginia A

[Affirmed, December 12, 1979, Commission, decision No. 12868-C, unpublished].

Decision of Appeals Examiner
September 11, 1979

No. UI-29-6287

Absence:
Reasons

Misconduct 15.2

Claimant, who was repeatedly warned regarding her attendance record, was discharged following numerous absences; one such incident had lasted 3 months, on the advice of her doctor, who was treating her for a nervous disorder. Her husband was an alcoholic and was particularly responsible for her absences. Following a final warning from her employer in March 1979, she was, nonetheless, absent much of April because her husband had forbidden her to go to work and had disabled her car. She lived about 30 miles from the plant, and had no other transportation. Claimant separated from her husband, and he was forbidden to see or bother her. However, in July 1979, while intoxicated, he assaulted her and she, again, was unable to go to work; she was discharged because of her absence. At the time of the hearing, a charge of assault and battery was pending against the husband. *Held*, claimant separated, but not for misconduct connected with her work since there was insufficient evidence of willful disregard of employer's interests. She was terminated for the employer's convenience. Claimant's absences were for reasons beyond her control, not of a trivial or frivolous nature, nor were they avoidable. Her actions were those of a reasonable individual given the circumstances.

Findings of Fact

The employer appealed a determination of the local office claims deputy, issued under the provisions of section 60.1-58(b) of the code, which, effective July 22, 1979, imposed no disqualification on the claimant's separation from her last 30-day employing unit. The determination held that the claimant had been discharged for reasons insufficient to constitute misconduct in connection with her work.

The claimant was last employed by a company in Front Royal, Va. She worked from July 16, 1973, through July 8, 1979, and was terminated by her employer July 10, 1979, for unsatisfactory attendance.

The claimant had received repeated warnings for attendance problems during the course of her employment. In 1978, the claimant, due to a nervous disorder, was absent for 3 months, from the last week in April through the third week in July. The claimant was under the care of a doctor and had been advised not to work.

The claimant's husband is an alcoholic, and she has a retarded 15-year old daughter. The claimant's personal problems, particularly her husband's actions, contributed significantly to her absences. In March 1979, the claimant received a final warning from her employer to correct the attendance problem. The claimant was absent in April due to a car problem; her husband had forbidden her to go to work and had disabled her automobile. The claimant had no other means of getting to her job from her residence, approximately 30 miles away.

The claimant separated from her husband and he was forbidden to see the claimant or otherwise bother her. On the evening of July 8, 1979, the claimant's husband, while intoxicated, assaulted her, and she was unable to report for work the following day. The husband was charged with assault and battery against the claimant, and the matter is pending. The employer made the decision to terminate the claimant on July 10, 1979, because of her attendance problems.

Opinion

Section 60.1-58(b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found a claimant was discharged for misconduct in connection with work.

The Supreme Court of Virginia, in the case of *Vernon Branch, Jr.* v. *Virginia Employment Commission and Virginia Chemical Company,* record 770306, November 22, 1978, gave this definition of misconduct:

> In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violated a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests or the duties and obligations he owes his employer.

In the instant case, it is obvious the claimant was excessively absent from work. It is further apparent that the employer, in order to protect the corporate interest, could no longer condone the claimant's absences. The issue as to whether or not the employer should have terminated the claimant's services certainly does not fall within the realm of the examiner's jurisdiction. The only issue before the examiner is whether or not the claimant's conduct was within the definition of misconduct.

The employer has adequately shown that the claimant's absences were excessive and, thus, the burden is on the claimant to show mitigating circumstances for her conduct. The claimant's primary reasons for her absence were reasons over which she had little or no control. She acted as a reasonable individual in a similar situation would react and separated from the husband, but she was still not relieved of the problems he was causing. As the definition of the term misconduct readily points out, the act or acts must be deliberately perpetrated with the knowledge that the results are detrimental to the interest of the employer.

The claimant's absences, even though substantial, definitely were not for frivolous or trivial reasons that she could have avoided, and, thus, the concept of a deliberate and willful act has not been shown.

After reviewing the evidence in this case, the examiner concludes that the claimant was terminated for the general convenience of the employer, for reasons insufficient to constitute misconduct in connection with work as the term is used in section 60.1-58(b) of the code.

Decision

The determination of the deputy imposing no disqualification from the claimant's separation from her last 30-day employing unit is hereby *affirmed*.

GORDON R. NELSON
Appeals Examiner

READEX FICHE

New Mexico
SUPREME COURT
May 6, 1980

JIMMIE G. TRUJILLO *v.* EMPLOYMENT COMMISSION OF NEW MEXICO AND ALBUQUERQUE-BERNALILLO COUNTY ECONOMIC OPPORTUNITY BOARD

Evidence:
Weight and sufficiency

Misconduct 190.15

Claimant was discharged for actions inimicable to employer, but contended that the sole evidence entered against him was based on hearsay. His superior testified that several members of an advisory council had advised him of the claimant's view that the superior was violating Federal Program regulations. The council members, however, were not called to testify. The sole issue, thus, was whether the conclusion—that the employee was terminated for misconduct connected with work—was supported by substantial evidence. *Held*, it was not; the decision was reversed, because the evidence supporting the finding was not reliable and substantial under the circumstances present, and the necessary "residuum of legal evidence" was absent. Although hearsay evidence can sometimes be "reliable and probative" and the only evidence available, "the residuum rule should be retained in those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake." "Unemployment compensation" is deemed "a substantial right as a matter of public policy."

Opinion

PAYNE, Justice.

Appellant, Jimmie Trujillo, was fired on April 29, 1977, from his job with the Albuquerque-Bernalillo County Economic Opportunity Board. He applied for and was granted unemployment compensation benefits by the Employment Security Commission (ESC), but the ESC appeals tribunal reversed the award and demanded the return of amounts already paid to Trujillo. Trujillo sought review in the district court, and the court affirmed the ESC's final decision; thereafter Trujillo appealed to this court. We *reverse*.

Trujillo's employer leveled six charges of employment misconduct against him, any one of which, if substantiated, would have justified his dismissal without unemployment benefits. The only charge which the appeals tribunal found meritorious was that Trujillo conspired to align members of an advisory council against his superior, Eric Berg. The only evidence offered in support of that charge was the testimony of Berg himself. He testified that three members of the council had told him on several occasions prior to official council meetings that Trujillo had told them that Berg was taking actions that violated Federal program regulations. As a consequence, Berg testified, council members consistently questioned his decisions and forced him to prove the correctness of his actions.

Trujillo correctly contends that Berg's testimony was based on hearsay. That testimony, moreover, was controverted by Trujillo. The appeals tribunal could not have verified the accuracy of Berg's testimony nor ascertained the impressions of council members as they were never called to testify.

This appeal raises one issue: whether the ESC's decision—that Trujillo was guilty of employment misconduct sufficient to deny him unemployment benefits—is supported by substantial evidence. Related to the resolution of this issue is whether the "legal residuum rule" is applicable to this administrative decision.

"The residuum rule requires a reviewing court to set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial." 2 Davis, *Administrative Law Treatise*, section 14.10, pages 201-92 (1958). The rule was first enunciated in *Carroll* v. *Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916). That court set aside the compensation award of an administrative agency because the crucial finding there was based entirely upon the hearsay testimony of witnesses who said that the decedent had told them what caused his injury. The court concluded that "still in the end, there must be a residuum of legal evidence to support the claim before an award can be made." 113 N.E. at 509.

Since the *Carroll* case, courts have qualified their adherence to the rule. *Altschuller* v. *Bressler*, 289 N.Y. 463, 46 N.E.2d 886 (1943) and commentators have criticized it. 2 Davis, *supra*, sections 14.09-14.10 (1958). Professor Davis states that

> Rejection of the residuum rule does not mean that an agency is compelled to rely upon incompetent evidence; it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon. Rejection of the residuum rule does not mean that a reviewing court must refuse to set aside a finding based upon incompetent evidence; it means only that the court may set aside the finding or refuse to do so as it sees fit, in accordance with its own determination of the question whether the evidence supporting the finding should be deemed reliable and substantial in the circumstances.

Id. section 14.10, at page 293.

This is the proper position regarding evidence in most administrative adjudications. In many circumstances, hearsay is reliable and probative, and at times it may be the only evidence available. Nevertheless, we believe that the residuum rule should be retained in those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake. In those instances, "any action depriving him of that [right or ability] must be based upon such substantial evidence as would support a verdict in a court of law." *Young* v. *Board of Pharmacy*, 81 N.M. 5, 9, 462 P.2d 139, 142 (1969).

Decision

We interpret section 51-1-3, NMSA 1978, to establish unemployment compensation as a substantial right as a matter of public policy. The benefits in this case may not be denied on the basis of controverted hearsay alone. Controverted hearsay under these facts does not qualify as substantial evidence.

For this reason, we *reverse*.

H. VERN PAYNE, *Justice*
DAN SOSA, JR., *Chief Justice*
EDWIN L. FELTER, *Justice*

Arizona B

Decision of Appeals Board
February 25, 1980

No. 5442-79, B-341-79

Gross, aggravated, or other special misconduct disqualifications

Misconduct 200

A city building inspector was discharged for approving construction violating the city's building code. His duties included onsite inspection of residential construction for compliance with the city's building code, which required a 10-foot setback from the side property line. After making an inspection, he authorized the laying of the foundation for a residential home. However, the foundation was laid 2½, not 10, feet from the side property line. The error resulted from his sighting along metal pins in the ground; one was missing, and, thus, his sight line was distorted. The error was further compounded by the contractor's customary reliance on a *visual* inspection when pins appeared to be properly placed. Evidence was entered that other building inspectors also followed this practice; the inspector denied the allegation that he was "on notice" that visual inspections were inaccurate and unacceptable after an earlier incident. It was noted that this particular error was not reported until 8 months after it happened, and that his work performance was otherwise satisfactory. *Held*, not separated for misconduct connected with work; this act had not been due to gross carelessness or to negligence – he had but exercised the standard of care customary in his capacity and occupation.

Findings of Fact

The claimant had worked as a building inspector for a city in Arizona for approximately 3 years before his discharge on May 25, 1979. The discharge was due to an error he had made in approving construction that was in violation of the city's building code.

One of the claimant's duties as building inspector was to make onsite inspections of new residential construction for the purpose of ensuring compliance with the city's building and zoning code. The city's building code required that residential homes must have at least a 10-foot setback from the side property line.

In the fall of 1978, the claimant inspected a construction site and authorized the laying of the foundation for a residential home. The foundation was, in fact, approximately 2½ feet from the side property line, rather than the required 10 feet. He determined that the proposed foundation had the proper setback by sighting along metal pins, which he assumed represented the property corners. The error in the claimant's sighting occurred because the pin he relied on as an indicator of the northeast corner of the property was, in fact, a pin marking a change from a curved boundary to a straight-line boundary. The claimant found no other pin in that location and assumed that one to be the property corner pin. The pin that correctly marked the property corner was missing on the day the claimant examined the property; the property corner was approximately 9½ feet from the pin the claimant used.

The foundation contractor was also present at the site when the claimant

READEX FICHE

made his inspection. Evidence was presented showing that the foundation contractor also believed that the pin marking the change in boundaries was the northeast corner pin. The claimant testified that he relied on the representation of the foundation contractor that this was the corner pin. The claimant further testified that, when pins seem to be in proper position, it is his custom to visually inspect the site to determine if there are proper setbacks. Thus, since the pins seemed properly placed on this particular site, he made only a visual inspection and determined that the foundation was of the required setback.

The employer alleged that the claimant had made an error in the setback of a mobile home in 1977 by making a visual inspection, and therefore should have been on notice that a visual inspection was neither an acceptable nor accurate method of determining the proper setback. The claimant denied that he was under a duty to inspect that mobile home for setback.

It is undisputed that the work performance of the claimant was satisfactory until the discovery of the setback error and resultant discharge. It may be noted that the error was not reported until approximately 8 months after its commission.

An employer's witness, the assistant building inspector for the city, testified that inspectors do not routinely survey the land to determine the proper setback. He further testified that he assumes that pins and stakes are placed properly when he inspects a site and, when he finds pins in the ground, he makes only a visual inspection to determine compliance with the setback requirement.

A Flagstaff building inspector, familiar with the building site in question, testified that he would not have handled the inspection any differently than the claimant did. He also testified that he frequently relies on the building contractor's representation as to what constitutes the corner pin.

The error committed by the claimant in his inspection of the site did not come to the attention of the city manager until May 1979. The claimant was thereupon discharged solely on the basis of that error.

Reasoning and Conclusions of Law

Departmental regulation R6-3-51300 provides in part:

> A.1. A worker has the implied duty of performing his work with ordinary care and diligence and of making reasonable efforts to live up to such standards of performance as are required by his employer. Misconduct generally arises when a worker knowingly fails to exercise ordinary care in the performance of his duties.
>
> 2. "Ordinary care" means that degree of care which persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, having due regard to his or others' rights and safety and to the objectives of the employer. This standard is general and application will vary with the circumstances. For example, the ordinary care expected of a precision engineer will vary considerably from the care expected of a ditch digger. The accepted standard of performance establishes what is ordinary care.
>
> 3. This does not mean that every claimant discharged because of unsatisfactory work performance is subject to disqualification. In the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence, the claimant's failure to perform his work properly is presumed to be attributed to good faith error in judgment, inability, incapacity, inadvertence, etc. A conscientious employee may be unable to perform his duties to the satisfaction of his employer because of limited mental capacity, inexperience, or lack of coordination. If such person is discharged for unsatisfactory work his discharge is not for misconduct.

Departmental regulation R6-3-51190 provides in pertinent part:

> B.2.b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. This burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.

Since a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons.

A witness for the employer testified that the claimant had previously committed an act of negligence similar to the act that caused his present discharge. The claimant denied he was negligent in the previous instance. There is clearly insufficient evidence to use the alleged prior incident to establish recurring negligence on the part of the claimant. Therefore, unless the mistake that precipitated his discharge was one of gross carelessness or negligence, his discharge is not for misconduct under the benefit policy rules.

Gross negligence is defined as

> "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care . . . . Gross negligence is a manifestly smaller amount of watchfulness in circumspection than the circumstances require of a person of ordinary prudence . . . . That entire want of care which would raise the belief that act or omission complained of was the result of conscious indifference to the rights and welfare of persons affected by it. (Black's Law Dictionary, 5th edition)

The claimant made a visual inspection of the lot in question by sighting along the pins in the ground. He also testified that he relied on the representation of the foundation contractor as to which pins marked the corners. The evidence establishes that building inspectors customarily followed these practices.

The record eminently supports a conclusion that the claimant's error was not due to conscious indifference to the rights and welfare of his employer and others. The claimant exercised the standard of care that was customary in his capacity and in his occupation. The tribunal properly concluded that the claimant's discharge was not disqualifying.

Decision

The decision of the appeal tribunal is *affirmed*. The claimant's discharge was for reasons other than misconduct in connection with the work.

The employer's experience rating account shall be subject to charges for benefits paid the claimant as a result of this employment.

UNEMPLOYMENT INSURANCE
APPEALS BOARD

MARY A. BASS, *Chairman*
E. D. CROWLEY, *Member*
EUGENE R. MURRAY, *Member*

Florida B

Decision of Unemployment Appeals Commission No. 79-2736
March 18, 1980

Fair hearing and due process

Procedure 190, 195, 400
Able and available 160.1, 235.4

Claimant, speaking and understanding English imperfectly, was accompanied to the hearing by an interpreter. However, the referee refused to allow claimant to answer questions through the interpreter, despite repeated objections by her attorney. Therefore, claimant was denied a full and fair hearing, it being well-settled that opportunity to be heard must be full and fair, not simply illusory. It was sufficient that she felt unable to understand the proceedings in English and brought an interpreter to help her. However, her counsel's contention that the first hearing was limited to the reason contained in the determination, unable or unavailable for work due to pregnancy, was untenable; the factor of work-search also implied. Furthermore, her attorney's contention that inclusion of the work-search factor rendered the notice of hearing defective was erroneous, inasmuch as the notice actually apprised her of this factor. Nevertheless, because of the referee's failure to permit the claimant to speak through the interpreter, the decision of the referee is vacated and the matter *remanded* for a hearing *de novo* and decision on its merits.

Findings of Fact and Reasoning

We are not considering the issue of whether the claimant is able to work and available for work as provided in section 443.05(1) (c), Florida statutes, because of a procedural error committed by the appeals referee, which requires that the decision be vacated and the cause remanded for a hearing *de novo*.

The record reflects that the claimant brought an interpreter to the evidentiary hearing, because she did not believe she spoke and understood English adequately to understand the proceedings without assistance. Over the continuing objection of her counsel, the referee refused to allow the claimant to respond to his questions through her interpreter.

It is a well-settled principle that the opportunity to be heard must be full and fair, not merely colorable or illusory. *Ryan's Furniture Exchange, Inc.* v. *McNair*, 120 Fla. 109, 162 So. 483 (1935). The referee's procedure in this case denied the claimant a full and fair hearing. It is sufficient that the claimant believed that she could not adequately understand the proceedings in English and thus brought an interpreter with her to require that she be permitted to testify through an interpreter.

Counsel for the claimant has contended that the issue of the claimant's ability to work and availability for work is limited to the reason provided by the initial claims determination; that is, "You are not considered currently able to work or available for work due to your pregnancy." The commission rejects this contention. The issue of the claimant's ability to work and availability for work includes consideration at the evidentiary hearing of her search for work. *See, Florida Industrial Commission* v. *Ciarlante*, 84 So.2d 1 (1955) [AA450-35, BSSU1]. In that case, the court stated at pages 4 and 5:

> It has also been argued here on behalf of claimant that the policy adopted by the Florida Industrial Commission of requiring claimants to indicate their desire to become employed and their "availability for work" by actively seeking work has the effect of adding, administratively, an additional requirement for eligibility to those prescribed in Section 443.05, Fla. Stat. 1953, F.S.A., and one which is contrary to the provisions of Section 443.06(2), Fla. Stat. 1953, F.S.A. This contention cannot be sustained.
>
> The Act not only requires registration for employment but, also, that the claimant be found to be able to work and available for work. It does not seem to be an unreasonable interpretation of the general terms of the statute that "availability" should be evidenced by something more than mere registration with an employment agency and an expressed willingness to work. Nor is there anything in such interpretation which conflicts with the provisions of Section 443.06(2). This latter section has to do with the *disqualification* of a claimant, which is not the same thing as the *eligibility* of a claimant. As stated in *Beaman* v. *Safeway Stores, Inc.*, *supra*, 277 P.2d 1010, 1012, "Ineligibility and disqualification as used in the act do not mean the same thing and are not intended to be applicable to the same conditions. Eligibility relates to 'a status indispensable to the operation of the act' whereas disqualification refers to a limited deprivation of benefits because of a specific affirmative act." The claimant contends that, under Section 443.06(2), "the commission must show a job was available to the applicant, that it was suitable and that he refused it without good cause, before it can rule that he is disqualified for benefits"; but, even if this be true, there is no conflict with an administrative policy to require a claimant to show that he actively, albeit unsuccessfully, sought work, as a condition precedent to *eligibility* for benefits during his benefit year. While the burden may be on the Commission to show that the claimant has become disqualified for unemployment compensation during a portion of his benefit year, under Section 443.06(2), it is generally held that the burden is on the claimant to prove that he has met the requirements of eligibility prescribed by the Act, including, of course, the requirement of "availability" for work. We see nothing to require our substituting a different interpretation of the Act from that adopted by the Commission entrusted with the responsibility of administering the statute and, accordingly, we sustain its interpretation, as set forth above.
>
> (Citations omitted)

Counsel for the claimant further contends that, if the issue of the claimant's ability to work and availability for work includes consideration of her search for work, the notice of hearing was inadequate. The commission rejects this contention. The record reflects that the notice of hearing mailed to the claimant provided in pertinent part: "The courts have ruled that 'available for work' means the claimant must be actively seeking and applying for employment. Testimony will be taken on your search for work." The notice of hearing adequately apprised the claimant of the issue in controversy.

Decision

The decision of the appeals referee is *vacated* and the cause is remanded for a hearing *de novo* and a decision upon the merits.

UNEMPLOYMENT APPEALS
COMMISSION

R. CARSON DYAL, *Chairman*
DELOIS BASKIN, *Member*
CHARLIE HARRIS, *Member*

READEX FICHE

Arkansas

COURT OF APPEALS

June 18, 1980

WILLIS JOHNSON COMPANY *v.* CHARLES L. DANIELS, AND DIRECTOR OF LABOR AND RALPH ROGERS

Jurisdiction and powers of tribunal

Procedure 275

A route salesman, discharged for failing to follow his scheduled duties and falsifying his log, admitted these shortcomings. However, he otherwise minimized and rationalized the implication of such failings as well as contending that his supervisor was fully aware of his actions. Employer admitted that claimant's work performance was good. The board of review concluded that his separation was for employer's convenience, that he had performed his work to the best of his ability, and that he had not knowingly or willingly acted in any manner inimical to employer's best interest. *Held*, entitlement to benefits *affirmed* because substantial evidence existed to support the board's decision. Although the court might well have reached a different conclusion, it could not substitute its judgment for that of the board as to findings of fact; its jurisdiction was limited to questions of law. The board's findings of fact were conclusive if supported by substantial evidence; such findings are reversible on appeal only if they were arbitrary, capricious, or unreasonable, without substantial evidence to support them, or if gained by fraud or corruption.

JAMES H. PILKINTON, JUDGE:

The appellee, Ralph Rogers, was discharged by his employer, Willis Johnson Company, Inc., the appellant. Subsequently, Rogers filed a claim for unemployment benefits, which claim the employer contested. The agency denied benefits to the appellee under the provisions of section 5(b)(1) of the of the Arkansas Employment Security Act, holding that Rogers had been discharged from his last employment for misconduct in connection with his work. The employee appealed; the appeal tribunal reversed the determination of the agency and allowed Rogers unemployment benefits. On appeal from that decision, the board of review affirmed the determination of the appeal tribunal. The employer has now appealed to this court from the decision of the board of review. The employer contends that Rogers should be denied benefits under the provision of section 5(b)(1) [Ark. Stat. Ann., section 81-1106(b)(1) (Repl. 1976)] because he was discharged from his last employment for misconduct within the meaning of the law.

The sole issue before this court is whether there is substantial evidence in the record to support the decision of the board of review. We are not permitted to hear the case de novo.

The record shows that there were three separate hearings held before the appeal tribunal. Evidence was taken on November 14 and December 13, 1979, in Fort Smith, Ark., where the employee lived. Evidence was taken at Little Rock, Ark., on November 28, 1979, where the employer has its offices. The testimony shows that the claimant had worked for the employer as a route salesman for approximately 4 months before he was discharged in July 1979. Although he performed sales work, he was paid on a straight salary basis and was required to work a 40 hour week. The evidence submitted by the employer indicates the discharge was because Rogers would not adhere to a prescribed itinerary. The evidence on behalf of the appellant stressed that it was very important for Mr. Rogers to contact potential customers in the morning hours. The employer claimed that, from time to time, Mr. Rogers would not get to work at an early enough hour. The employer further contended that the claimant misrepresented information as to his daily stops by falsifying the log he was required to keep.

The record shows that the claimant acknowledged that there were some mornings when he did not get an early start, but he said this was almost always with the full knowledge of his immediate supervisor in the Fort Smith area. Rogers further admitted that there were misrepresentations on his daily reports. He sought to justify the inaccurate data by saying that these reports were filed with the full and complete knowledge of his supervisor. The claimant also said that even the employer's retail sales manager had mentioned that the daily logs were often misrepresented because the procedures used to complete them were somewhat outmoded and impractical. Claimant further contended that the sales work he was doing often called for irregular hours, but he felt that he had in fact worked 40 hours a week throughout his employment. It was his position that he was doing a very satisfactory job for his employer. He claims that the reason originally given for his discharge was that he had too many outside interests. The employer acknowledged that when the claimant worked he performed his job very well.

The evidence at the hearing was contradictory. The board of review found that, according to the greater weight of the evidence, the claimant generally performed his work to the best of his ability and that he did not knowingly or willingly act in any manner against the best interest or welfare of his employer. The board of review determined that the appellee was discharged from his last employment for the convenience of the employer, and for reasons other than misconduct in connection therewith within the meaning of the law.

Ark. Stat. Ann., section 81-1107(d)(7) states

> . . . In any proceeding under this subsection the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of said Court shall be confined to questions of law.

That has been amplified by case law

> . . . In a proceeding of this kind the Board's findings of fact are conclusive if supported by evidence; which of course means substantial evidence. *Terry Dairy Products Company, Inc.* v. *Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955) [PR-380.2-3, BSSUI].

Like the decision of any other administrative tribunal, decisions of the board of review are reversible on appeal to the courts only if they are found to be arbitrary, capricious, unreasonable, and without substantial evidence to support them or in cases of fraud or corruption. *City of Fort Smith* v. *Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952).

In the recent case of *Harris* v. *Daniels, et al.*, 263 Ark. 897, 567 S.W.2d 954 (1978), the Arkansas Supreme Court stated

> In appellate review . . . we must give the successful party the benefit of every inference that can be drawn from the testimony, viewing it in the light most favorable to the successful party, if there is any rational basis for the board's findings based upon substantial evidence. (cases cited) Even though there is evidence upon which the Board of Review might have reached a different result, the scope of judicial review is limited to a determination whether the board could

> reasonably reach its results upon the evidence before it and a reviewing court is not privileged to substitute its findings for those of the board even though the court might reach a different conclusion if it had made the original determination upon the same evidence considered by the board. (cases cited) Even if the evidence is undisputed, the drawing of inferences is for the board, not the courts. *Kessler* v. *Industrial Commission*, 27 Wis. 2d 398, 134 N.W.2d 412 (1965).

Section 5(b)(1) of the Employment Security Law is codified at Ark. Stat. Ann., section 81-1106(b)(1) and reads as follows

> 81-1106. Disqualification for benefits—For all claims filed on and after July 1, 1973, if so found by the Director, an individual shall be disqualified for benefits:
>
> * * *
>
> (b) Discharged for misconduct. (1) If he is discharged from his last work, for misconduct in connection with the work, such disqualification shall be for eight (8) weeks of unemployment as defined in subsection (i) of this section . . . .

At 76 Am. Jur. 2d, *Unemployment Compensation*, section 52, it is stated at pages 945-946,

> . . . misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employees, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence, or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional or substantial disregard of an employer's interests or of an employee's duties and obligations. 76 Am. Jur. 2d, *Unemployment Compensation*, section 54.

In keeping with the declaration of the state's public policy of providing benefits to workers who are unemployed through no fault of their own as set forth in the Arkansas Employment Security Law (Ark. Stat. Ann., section 81-1101), the statutory misconduct provision of the law must be interpreted in keeping with that declared policy. *Little Rock Furniture Mfg. Co.* v. *Commissioner of Labor*, 227 Ark. 288, 291, 298 S.W.2d 56 (1957) [VL-475.35-25, BSSUI]. It should not be construed so literally as to cause a forfeiture of benefits by an employee except in *clear* instances of misconduct. 76 Am. Jur. 2d, *Unemployment Compensation*, section 52.

On the record before us, it might well be argued that the appellee's misrepresentations of data on the daily logs and reports he was required to keep constituted clear instances of misconduct within the meaning of the law. Certainly in the business world, any misrepresentations of the nature admitted by this employee are serious. Even though the procedures used in completing daily logs may have seemed somewhat outmoded and impractical as appellee claims, this circumstance would not justify an employee's falsifying reports required by the employer and considered to be necessary, current, and practical. If this court were entitled to make the original determination of this case on the same evidence as considered by the board of review, we would probably reach a different conclusion and hold that this employee was not eligible to receive unemployment benefits; however, we are not privileged to substitute our findings of fact for that of the Arkansas Employment Security board of review. Even where the evidence is undisputed, the

READEX FICHE

credibility of witnesses and the drawing of inferences is for the board of review, not the courts. *Harris* v. *Daniels*, *supra*, and cases there cited. In the case before us, the board accepted and believed the explanations and excuses given by Rogers for his admitted, questionable activities. The board of review found as a matter of fact that appellee generally performed the work to the best of his ability and did not knowingly or willingly act in a manner against the best interest or welfare of his employer. Although it may be hard for us to understand how the board of review could reach the conclusion it did, we are bound by the decision of the board as we cannot say that there is no substantial evidence in the record to support the decision. As noted, the evidence was in conflict, and although the part of it that supports the claimant is strongly disputed by the employer, we cannot say there was no substantial evidence to support the result reached by the board of review. Therefore we must *affirm*.

Hays, J., dissents.

Wisconsin

CIRCUIT COURT
DANE COUNTY

May 12, 1980

JUDITH ROSS *v.* DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, AND COUNTY OF MANITOWOC

Taking and perfecting
proceedings for review:
Timeliness

Procedure 430.2

Claimant, ruled ineligible for benefits after terminating her employment with the county and initiating claims, was advised that an appeal had to be received by "2/08/79." It was received from her attorney on February 20. It was dismissed because it was untimely, and the untimeliness had not been beyond her control. The reason for lateness was given as "misunderstanding." Claimant thought her attorney would appeal; the attorney thought claimant would appeal. *Held*, dismissal affirmed, the appeal untimely essentially because not only "good cause" was absent, but also the circumstances had not been "beyond control" of the parties.

The Issue

Did the employee show good cause that the reason for having failed to file a request for hearing timely was beyond her control within the meaning of section 108.09(3)(f), Stats.?

Statement of Facts

The employee terminated her employment with the defendant, County of Manitowoc, on January 10, 1979, and filed for unemployment compensation. A deputy for unemployment compensation of the Department of Industry, Labor and Human Relations (DILHR) determined that the employee was not eligible for benefits. That decision was mailed to the parties on January 25, 1979, with a statement that the decision was "final unless an appeal is received on or before 2/08/79." The statutory 14-day appeal period expired at the close of business on that day.

A letter from attorney Nicolai, the employee's counsel, dated February 16, 1979, was received in a Job Service office of DILHR on February 20, 1979. That letter stated that the employee wished to appeal the deputy's decision dated January 25, 1979.

On February 28, 1979, the appeal tribunal issued a decision in which it found that the request for hearing was not timely within the meaning of section 108.09(2r), Stats., and that the employee did not show probable good cause that the reason for having failed to file a timely request was beyond her control. The decision accordingly dismissed the request for hearing.

The employee through her attorney filed with DILHR a petition for review. This petition, among other things, stated

Appelant (sic) had sent the decision of the examiner to her attorney and was of the opinion that her attorney was going to file the appeal in the matter. Her attorney through mistake in communications, was under the opinion that the appelant (sic), Judith Ross, had filed the appeal.

It was not until after the appeal time had expired that both parties became aware that the other had not filed the appeal. The appelants' (sic) ability to file the appeal was beyond her control in that she was under the belief that the appeal was being filed by her attorney.

The appelant (sic) has a meritourious (sic) appeal and believes that upon appeal she would prevail in obtaining unemployment benefits.

Statutes Involved

Section 108.02(21), Undefined Terms:

Any word or phrase used in this chapter and not specifically defined herein shall be interpreted in accordance with the common and approved usage thereof and in accordance with other accepted rules of statutory construction. No legislative enactment shall control the meaning or interpretation of any such word or phrase, unless such enactment specifically refers to this chapter or is specifically referred to in this chapter.

Section 108.09(2r), Hearing Request:

Any party to a determination may request a hearing as to any matter in that determination if such request is made in accordance with procedure prescribed by the department and is received by the department within 14 days after a copy of the determination was duly mailed or given to such party, whichever first occurs. An employer cannot request a hearing unless the employer has completed and filed or simultaneously with the request for hearing completes and files any required report as to the employe's eligibility, weekly benefit rate and credit weeks, and cannot request a hearing with respect to benefits already paid either in accordance with the employer's concession of liability or because the employer failed to complete or timely file any required report as to the employe's eligibility, weekly benefit rate and credit weeks.

Section 108.09(3):

(f) The appeal tribunal shall dismiss any request for hearing which has not been timely filed unless the party filing such request shows probable good cause that the reason for having failed to file the request timely was beyond the control of such party.

The Court's Decision

There is no question but that the request for hearing was not filed with DILHR within the 14-day period prescribed by section 108.09(2r). Thus, the only question to be resolved is whether the employee had made a showing of good cause for her failure to have made a timely request for hearing.

The request for hearing was made by the employee's counsel on her behalf and in it counsel stated

> I realize this notice is late, however, it appears there was confusion between myself and my client. My client thought I had filed the appeal and I thought my client had filed the appeal.

This was the only attempted showing of good cause the appeal tribunal had before it when it issued its decision. The petition for review of the appeal tribunal's decision elaborates on this showing slightly, but essentially discloses no additional fact that would constitute good cause.

To constitute good cause beyond the control of the party requires not only good cause, but factors that are beyond the control of the party. An example might be failure of the U.S. Postal Service to deliver an initial determination to a party for which a proper address was given. Another might be incapacitating illness of either the employee or the attorney entrusted with filing the request for hearing. Here, there was no explanation offered that an event beyond the control of either the employee or her attorney had occurred to prevent the timely filing of the request for hearing.

There is no reason either the employee or her attorney could not have appealed in a timely manner. There is no reason either the employee or her attorney should not have contacted the other to insure a timely appeal. Neither the employee nor her attorney did anything except "think" that the other was appealing. Such failure to act does not constitute "good cause."

A situation very similar to the present one was faced by the Honorable Richard W. Bardwell in *Ahrens* v. *DILHR* and *George Banta Company and Bojarski* v. *DILHR and George Banta Company*, Dane County Circuit Court, cases 163-192 and 163-193, (May 16, 1979) [PR-430.2-91, BSSUI]. In those cases, the two plaintiffs were among a group of employees involved in disputes concerning unemployment compensation benefits. Their benefit claims were initially denied by a DILHR deputy. The plaintiffs and their attorney thought that the other or the union had filed appeals from the initial determination. It was not until after the appeal period had expired that it was discovered that appeals had not been filed. Plaintiffs argued that under these facts they had shown probable good cause that the failure to file a timely appeal was beyond their control and thus came within the provisions of section 108.09(3)(f), Stats. Judge Bardwell in rejecting their argument, noted in his memorandum decision:

> . . . the plaintiffs proffered evidence that there was some confusion among them, the union and Swain [the attorney] regarding who would file the necessary papers.
>
> While plaintiff's reliance on the union's indications that it would process the appeal may have been reasonable, such reliance does not remove responsibility from the plaintiffs. They could at any time have discerned the status of their cases by consulting the union, Swain or the department. Furthermore, if they were induced to rely on their union or attorney, their complaint is against those parties, and not the department or employer. From the perspective of the department and the employer, the failure to timely file hearing requests were matters for which the employees were solely responsible, and their voluntary relinquishment of this responsibility to their union and legal representatives did not place these events beyond their control.

The employee's brief cites the holding made in *Willing* v. *Porter*, 266 Wis. 428, 63 NW 2d 729 (1954) that a court of appeal sits as a court of conscience and should do or secure substantial justice between the parties under all the circumstances where a party has a good and conscionable case and presents no excuse for a default in some part of their pleadings or proceedings; and, further, that the court sitting as a court of conscience should attempt to allow the parties to be given a trial on the merits upon such terms as to do justice to both parties. However, the *Willing* v. *Porter* case involved an action on an employment contract, not court review of an administrative agency decision. The court in the latter situation possesses no discretionary power to reverse and remand in the interest of justice. *Wagner* v. *Industrial Comm.*, 273 Wis. 553, 567d, 79 N.W. 2d 264, 80 N.W. 2d 605 (1956).

The employee's brief also cites section 805.18(1), Stats., which provides

> The Court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party.

This statute has no application to this case inasmuch as chapter 805, Stats., has to do with court actions and not administrative agency proceedings. The word "proceedings" in section 805.18(1), therefore, cannot be interpreted as applying to proceedings that have occurred before an administrative agency.

Let judgment be entered *confirming* the commission's decision, which is the subject of this review.

GEORGE R. CURRIE
Reserve Circuit Judge

Prepared by Employment and Training Administration

READEX
FICHE

Kentucky A

Decision of Hearing Officer
May 13, 1980

No. AD# 80-2625 Multi

Receipt of other payments: General

Voluntary Leaving 5
Able and available 375.05
Miscellaneous 375.05

Claimants, who were employed more than 1 year as hourly employees and who were union members, were separated annually because of the plant's weekly shutdown for vacations. Such layoff was in accordance with the union-management contract. All hourly employees were laid off regardless of accrued vacation pay. Claimants herein, however, were denied benefits although they were ineligible for vacation pay. *Held*, affirmed since by the fact of union membership "they had voluntarily agreed to be both without work and without vacation pay for the week for which they sought unemployment benefits."

Facts

The claimants, members of a labor union, were employed by the company for more than 1 year. Under the terms of the union-company labor contract, the plant is closed each year during Christmas week for vacation. All hourly employees, such as these claimants, are unemployed during that week, regardless of whether they have accrued vacation pay or not. in this case, the claimants were not entitled to vacation pay during the week of shutdown.

Decision

The adjusted determinations are *affirmed*.

Reasons

This case presents one of the more troubling questions in the administration of unemployment insurance programs: The right to benefits under collective bargaining agreements when workers are idled by vacation shutdown but are unqualified for vacation pay. There is a predictable split of authority among the various jurisdictions. In their resolution of this issue, the States can be divided broadly into two groups: Those following the "agency" theory and those following the "nonagency" or "actual fact" theory. If contract language exists authorizing a shutdown for vacation purposes and specifying how entitlement to vacation is accrued, the former theory denies benefits to workers for weeks during the shutdown for which they have no vacation pay entitlement. Contrarily, the latter theory denies benefits only in the presence of evidence that the worker, by some individual act separate from the collective action of the bargaining agent, has affirmatively assented to be both without work and without vacation pay.

For years, the Kentucky Division for Unemployment Insurance tried to resolve this issue without the aid of Kentucky judicial authority. The Kentucky high court had applied the agency theory to disqualify retirees (see *Kentucky Unemployment Insurance Commission* v. *Reynolds Metals Company*, Ky.

READEX FICHE

(1962) 360 S.W. 2d 746, but its applicability to the vacation situation was unclear. The Kentucky commission invoked the agency theory to deny benefits in a vacation situation in C.O. No. 7210 (1967). But 2 years later, it scrapped the agency theory in vacation cases and announced that it thenceforth would follow the actual fact theory. See C.O. No. 8101 (1969). That latter administrative precedent was controlling in this state until the Court of Appeals handed down its decision on June 8, 1979, in the case of *Murray Tappan* v. *Kentucky Unemployment Insurance Commission*, Ky., 583 S.W. 2d 100.

In *Tappan*, the court embraced the agency theory. In denying benefits, it found that the language of the collective bargaining agreement authorized Tappan to shut down for vacation purposes, that it specified how the claimant should accrue entitlement to vacation pay, and that the claimants had not met the contractual formula for vacation pay. It concluded that, through the agency of their union, workers had voluntarily agreed to be both without work and without vacation pay for the weeks for which they sought unemployment benefits.

In the preamble accompanying the original Unemployment Insurance Law of Kentucky, the Kentucky General Assembly stated its intent that the act protect "persons unemployed through no fault of their own." In *Tappan*, the court read this legislative intent through the specific provisions of the current act's voluntary quit clause, KRS 341.370 (2)(c), which disqualifies from benefits workers who voluntarily quit their employment without good cause. It reasoned that a worker who, by personal agreement, is both unpaid and out of work during a shutdown period is not within the category of faultless workers that the act is designed to protect but, rather, in a situation analogous to a worker who voluntarily quits without good cause. Just as the worker who voluntarily quits without good cause is disqualified from benefits, the employee who voluntarily agrees to be both without work and without pay during vacation shutdown is ineligible for benefits.

The conditions under which the claimants in the present case were unemployed are the same as those in the *Tappan* case. Consequently, the referee is bound by the precedent established by *Tappan* and must deny benefits to these claimants.

C. R. WALTERS, SR.
Hearing Officer

Washington B

Decision of Commissioner's Delegate
March 31, 1980

No. 0-00052

Discharge or leaving:
Leaving in anticipation of discharge

Voluntary leaving 135.2, 135.35
Misconduct 135.35

An accountant, informed by her supervisor that another accountant, experienced in hospital budgeting work, had been hired, asked if "today or tomorrow" would be her last day. She was told to continue in her duties, as the new employee would concentrate exclusively on budget work, experience she lacked. However, although she still "assumed" she would be terminated, specific words such as "fired," "terminated," or "laid off" were never used. The supervisor also never gave a deadline or definite date of separation. The employee decided that Friday, November 23, would be her last day, because she had finished certain financial statements. Nevertheless, she testified that her supervisor indicated he expected her to be at work the following Monday. *Held*, voluntarily quit without good cause because no separation date was ever set by employer; it was set solely and unilaterally by her. Thus, she quit "in anticipation of discharge," when a basis for such conclusion was absent; i.e., her assumption in this respect was baseless. Furthermore, friction with other employees is so prevalent in employment that it does not justify termination in this case.

Findings of Fact

Claimant was employed as an accountant by the employer from June 12, 1979, until November 23, 1979, when she voluntarily quit.

On November 9, 1979, claimant's immediate supervisor advised her that another accountant, experienced in hospital budgeting work, which experience claimant lacked had been hired. Claimant asked if "today" or "tomorrow" would be her last day, and the supervisor replied that she should continue so that the new employee could concentrate entirely on budget work. Claimant continued to "assume" (her word) that she was to be terminated, although specific words such as fired, terminated, or laid off, were never used. The supervisor never stated a definite date beyond which claimant's services were not required. Claimant decided that Friday, November 23, 1979, would be her last day because she had completed certain financial statements, even though from her testimony the supervisor indicated that he expected her to be at work the following Monday.

Conclusions

Previous commissioner's decisions have set forth the principle that there is a difference between leaving work "in anticipation of discharge" and leaving work "in lieu of discharge." The former is adjudicated under RCW 50.20.050, the voluntary quit statute, and the latter under RCW 50.20.060, the discharge statute. A quit "in anticipation of discharge" results when an individual presumes that he or she may be discharged and quits. A quit "in lieu of discharge" is found when the individual is told that employment will be terminated for cause on or about a certain date and the individual quits.

In re Birkowski, Comm. Dec. 620 (1965); *In re Martin*, Comm. Dec. 1011 (1973).

In this case, claimant "assumed" she was to be terminated and replaced by the newly hired accountant. No date of separation from employment was ever set by the employer; such date was at claimant's initiative. It is therefore concluded that claimant voluntarily left her job, and that her reasons for so doing do not amount to statutory good cause. Claimant's problems concerning friction between her and other employees is not unusual in the employment relationship and also would not afford her a basis in good cause for leaving the job. Accordingly,

Decision

It is hereby ordered that the decision of the appeal tribunal entered in this matter on the 24th day of January 1980 shall be set aside. Benefits shall be *denied* the claimant, beginning November 18, 1979, and continuing thereafter until she has obtained work and earned wages of not less than her suspended weekly benefit amount in each of 5 calendar weeks.

PATRICIA L. STIDHAM
Commissioner's Delegate

Illinois B

Decision of Board of Review No. 79-4814
January 21, 1980

Working conditions: Environment

Voluntary leaving 515.35

A secretary clerk in an abortion clinic, disturbed by various incidents of automobile vandalism and physical assaults on coworkers by persons opposed to activities at the clinic, quit after a stone-throwing assault directed at her by several unknown women. During a period of several months, her car radio antenna had been broken off, the premises were picketed by anti-abortionists, and her protests were not only ignored—the existence of some of these adverse factors were denied. A morning security guard reported children throwing objects against cars in the parking lot; the employer considered securing the area with a fence and gate and hiring a second guard in the afternoon. These actions occurred after claimant's termination. *Held*, voluntarily left for good cause because claimant's apprehension for her safety was not only reasonable but did not need to be substantiated by inevitable aggravated injury.

Decision

This is an appeal by the claimant from a referee's decision, dated August 27, 1979, which reversed the claims adjudicator's determination and held that the claimant is subject to a disqualification of benefits from July 8, 1979, through September 1, 1979, under the provisions of section 601A of the Unemployment Insurance Act.

We have carefully reviewed the record of the evidence and the transcript of the testimony submitted before the referee at a hearing conducted on August 14, 1979, in Alton, Ill., at which time the claimant and a representative of the employer appeared. The record is adequate, and we do not deem it necessary to take additional evidence.

The record discloses the following facts: The claimant worked for the employer from May 7, 1979, until July 9, 1979, as a secretary-clerk, earning a final wage rate of $675 per month. The claimant testified that she voluntarily quit her job because of various incidents involving automobile vandalism and physical assaults on her coworkers. These culminated on her last day at work when three unidentified women who objected to abortions performed on the employer's premises stoned her. The claimant stated that she was struck by a rock during the incident, and that her car was nicked by the missiles. She added that on a previous occasion the radio antenna of her automobile had been broken off.

The representative of the employer testified that it had a security guard during the morning hours, and the guard had reported that there were numerous children in and around the parking lot "throwing things at the cars and," the witness added, "that's why we hired the security guard to be there in the morning and we also have a security guard in the afternoon." The second security guard for the afternoons was hired after the claimant had left her job. In reply to the referee's question as to how long automobile vandalizing had been occurring, the witness answered, "We hadn't had any

READEX FICHE

problems for over a year and it just happened in the month's time," and that the employer was also contemplating surrounding the parking lot with a fence and gate.

The claimant testified that one of the counselors working for the employer was hit on the back with a rock when she went outside to retrieve some papers forgotten by one of the patients, along with some "anti-abortion literature." The claimant stated that there had been incidents in the past of automobile vandalism, for which a police report was made. She also stated that the clinic had been picketed by anti-abortionists who demonstrated their opposition to its activities. In response to the referee's question as to whether she ever voiced her concern about the conditions that she described, the claimant stated as follows:

> I know that we did discuss the vandalism that occurred on the cars, the antennas that had been broken, marks up and down five or six cars in the lot, and talked about that. Nothing was done. A police report was made, but a few days after that had happened the director denied that it even happened and she had been out there taking pictures.

The issue presented to the board of review is whether the claimant left work voluntarily with good cause. The Unemployment Insurance Act provides, in pertinent part, as follows:

> Section 601, Voluntary Leaving: A. An individual who has been paid wages within each of at least three calendar quarters of his base period for insured work shall be ineligible for benefits for the week in which he has left work voluntarily without good cause and, thereafter, until whichever of the following shall first occur: (1) He is not an "unemployed individual" as defined in Section 239 by reason of having accepted bona fide work; or (2) eight consecutive weeks have elapsed which begin on the first day of the first week with respect to which he has filed a claim.

Unemployment insurance benefits are payable on the insurance principle to unemployed workers who are involuntarily unemployed because of economic conditions beyond their control. An individual who leaves work is involuntarily unemployed if he can establish that he quit his job because of compelling circumstances or because the conditions of his work had become so imcompatible with his well-being as to render the work unsuitable for him. Whether an individual has good cause for voluntarily leaving his employment must be measured by what the ordinary, prudent person, who sincerely desires to maintain his employment relationship, would have done under similar circumstances.

In the case before us, the employer was engaged in professional services that were the subject of controversy, this was manifested by the presence of picketers, protesters, and demonstrators, some of whom, the claimant testified, engaged in overt acts of violence directed against employees of the respondent. According to the employer, incidents of vandalism had occurred previously, albeit not for the past year, and an afternoon security guard was hired in recognition of the problem after the claimant had left her job. The claimant also testified that she was pelted with stones thrown by several individuals with an apparent intent of striking her. Under these circumstances, the claimant's apprehension regarding her safety was not unreasonable, and it was not necessary that it be confirmed by waiting until an actual injury was inflicted on her in a subsequent assault. Accordingly, we find that the claimant left work voluntarily with good cause within the meaning of the statute. She was, therefore, not subject to disqualification of benefits under the provisions of section 601A of the Unemployment Insurance Act.

The claimant was eligible to receive benefits provided that the claims adjudicator determines that she was able to work, available for work, and actively searching for work, as required under section 500C of the act.

The decision of the referee is *reversed*, subject to the above provision.

Board of Review of the
Department of Labor

Dennis H. Block, *Chairman*
Eugene E. Christy, *Member*
Davide W. Tomei, *Member*

330

Report 330-1
September 1980

BENEFIT SERIES SERVICE UNEMPLOYMENT INSURANCE

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SPECIAL NOTICE

Attention is called to "PR-350-," payment of benefits when due, time lapse, Federal courts' higher authority appeals cases in Pennsylvania and Florida.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING ADMINISTRATION
Unemployment Insurance Service
Prepared by Division of Program Policies and Legislation
601 D Street, N.W.
Washington, D.C. 20213

L 37.209:

READEX FICHE

Pennsylvania

SUPREME COURT
WESTERN DISTRICT

DOMENIC A. BORELLO, JR., *et al. v.* COMMONWEALTH OF PENNSYLVANIA, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW *et al.*

July 16, 1980

Financing and participating:
Picketing or refusal to
pass picket line

Labor dispute 205.2, 125.1

Of 3 separate groups employed by a general contractor, one group (building and construction craft unions) reached a renewal agreement with employer after the existing contract expired. The other two groups (iron workers and millwrights) did not, but they offered to enter into an *interim* agreement providing for retroactive application of any wage increase won. Employer not only refused but also prohibited ironworkers and millwrights to enter the construction sites. In retaliation, the workers set up peaceful picket lines, and the craft unions honored them. *Held*, since the employer first refused to maintain the status quo, the work stoppage with respect to the ironworkers and millwrights must be deemed a lockout with ensuing entitlement to benefits. Such is not the case for the craft unions, however, because of their refusal to cross the picket lines. A decision to respect a picket line, where no danger exists, is no different from a judgment to strike.

Opinion

NIX, J.

This is an appeal from the decision of the Commonwealth Court which affirmed the orders of the Unemployment Compensation Board of Review (board), appellee, denying benefits to appellants under section 402(d) of the Pennsylvania Unemployment Compensation Law, Act of December 5, 1936, Second Exec. Sess., P. L. (1937) 2897, art. IV, section 402, *as amended*, 43 P. S. section 802(d).

Appellants are members of three separate groups, each of whom were employed by Townsend and Bottum, Inc., for the construction of the Bruce Mansfield Fossil-Fuel project at Shippingport, Pa., during 1976. The three groups consisted of (1) members of various building and construction craft unions (craft unions); (2) members of the Iron Workers Local 3 (ironworkers); and (3) members of Millwrights Local 2235 (millwrights).

A review of the record reveals the following sequence of events. On May 31, 1976, various labor-management agreements covering the appellants and others expired. On or before June 1, 1976, the craft unions did reach an accord, but neither the ironworkers nor the millwrights were able to reach agreements mutually satisfactory to Townsend and Bottum. Before their respective contracts expired, the ironworkers and millwrights offered to enter into an interim agreement, but required as part of that agreement that any wage increase subsequently won for the new contract be retroactive to June 1, 1976. Management refused and stated as a matter of policy "that if no agreement, tentative or otherwise, was reached by June 1, 1976, . . . it would . . . not allow the ironworkers and millwrights to enter the various construction sites . . . ." (Board's Finding of Fact 15.) No further formal offer to continue work as conveyed by either party before the deadline. No evidence of a formal strike vote nor any instruction from union leaders to its membership instructing them not to report for work on June 1 can be found in the record.

The construction site security guards were advised by management that as of June 1, 1976, they were to deny entry to ironworkers and millwrights, but to admit all other building and craft union members as usual. On the morning of June 1, 1976, certain job stewards and union representatives reported to the construction site and were denied entry by the security guards. The same occurred on June 2, 1976. On June 3, 1976, the two foreclosed unions set up peaceful picket lines at various job sites throughout western Pennsylvania including the instant project. Their picket signs asserted the failure of management to bargain in good faith. The craft union members reported for work that morning, but did not enter the project for work, nor did they do so until after the labor dispute was resolved on June 21, 1976.

Appellants filed for unemployment compensation for the period from June 1 to June 21, 1976. After their claims were denied by the Bureau of Employment and Security, the referee agreed with that determination, and the Unemployment Compensation Board of Review affirmed on appeal. The matters were consolidated before the Commonwealth Court and, after argument, it found the board's determination supported by the evidence and thus denied appellants' request for relief. 40 Pa. Commw. Ct. 353, 397 A.2d 471 (1979).

We turn first to the claim by appellants, millwrights and ironworkers, that the lower court erred in affirming the denial of compensation under section 402(d). Our scope of review is limited to a determination as to whether any errors of law were committed and, "absent fraud," that the board's findings are supported by the evidence. *Unemployment Compensation Board of Review* v. *Tickle*, 19 Pa. Commw. Ct. 550, 339 A.2d 864 (1975) [LD-420.1-89, BSSUI]; see, e.g., *Erie Forge and Steel Corporation* v. *Unemployment Compensation Board of Review*, 400 Pa. 440, 163 A.2d 91 (1960) [LD-125.1-111, BSSUI].

The millwrights and ironworkers assert their entitlement to unemployment benefits under section 402(d) on the grounds that they were "locked-out." That provision provides:

An employe shall be ineligible for compensation for any week—

> (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (*other than a lock-out*) at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (2) he is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (3) he does not belong to a grade or class of workers of which immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, or directly interested in, the dispute. (Emphasis added.)

The determining factor to the requested relief thus becomes whether the work stoppage was caused by an employer "lockout." The test for assessing responsibility for the work stoppage for purposes of the instant provision was enunciated in *Erie Forge and Steel Corporation* v. *Unemployment Compensation Board of Review, supra* at 444-445, 163 A.2d at 91[LD-125.1-111, BSSUI].

> . . . The law contemplates that collective bargaining will be conducted in good faith, with a sincere purpose to find a basis for agreement. Neither an adamant attitude of "no contract, no work" on the part of the employees, nor an ultimatum laid down by the employer that work will

> be available only on his (employer's) terms, are serious manifestations of a desire to continue the operation of the enterprise. While either or both of these positions may legitimately be taken by the parties during the bargaining negotiations prior to the expiration of the existing contract, *when the contract has in fact expired and a new agreement has not yet been negotiated, the sole test under section 402(d) of the Unemployment Compensation Law . . . . of whether the work stoppage is the responsibility of the employer or the employees is reduced to the following: Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations?* If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification for unemployment compensation benefits in the case of a "stoppage of work because of labor dispute" does not apply. (Emphasis added).

This test has been consistently followed.[1] *Unemployment Compensation Board of Review* v. *Sun Oil Co.*, 476 Pa. 589, 383 A.2d 519 (1978); *Philco Corporation* v. *Unemployment Compensation Board of Review*, 430 Pa. 101, 242 A.2d 454 (1968) LD 125.1-175,BSSUI]. As was recognized in *Philco Corporation, supra*, the *Erie Forge* test while "easy to verbalize (is) most difficult to apply to any given set of facts." The practical approach suggested there is "to determine which side, union or management, first refused to continue operations under the status quo *after the contract had technically expired*, but while negotiations were continuing." *Id.* at 103, 242 A.2d at .(Emphasis added).

Appellee contends that the millwrights' and ironworkers' demand for retroactive application from the date of expiration for any additional benefits won under the new contract as a prerequisite to its continuing work, caused the work stoppage, and thus blame lay with those parties and not with the employer. Both the board[2] and the commonwealth agreed.[3] The

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[1] An exception to the *Erie Forge* test was created in another decision handed down the same day, also authored by Justice Cohen. *Hershey Estates* v. *Unemployment Compensation Board of Review*, 400 Pa. 446, 163 A.2d 535 (1960) [LD-125.1-123 BSSUI]. It was held that where the nature of the industry involved is such that "it would be almost impossible to operate adequately on a day to day basis," a last-minute offer by the union to continue working under the existing terms and conditions, does not "constitute an offer to continue working *for a reasonable time.*" *Id.* at 450-451. In that instance, an additional burden is placed on the union to make an offer which is reasonable and indicates a "sincere willingness to continue working for *a reasonable time* under the pre-existing terms and conditions of employment pending negotiations" *prior to the technical expiration of contract*. Id. at 451. Only when "it appears that such an offer would definitely not be acceptable by management" is that burden alleviated. *Philco Corporation* v. *Unemployment Compensation Board of Review*. 430 Pa. 101, 104, 242 A.2d 454 (1968) [LD-125.1-175, BSSUI]. (Emphasis added).

The industries involved in the Hershey Estates' case and cited as triggering the exception consisted mostly of "service industries, i.e., hotel, laundry, department store, community inn, etc." *Hershey Estates* v. *Unemployment Compensation Board of Review* at 451, 163 A.2d at ___ [LD-125.1-123,BSSUI]. The industry involved here, construction of a fossile-fuel project, does not fall within the category of "service industries" that would be impossible to operate on a day-to-day basis. Thus the Hershey Estates exception is inapplicable to the instant appeal.

[2] The Board made the following finding:

The union must bear legal responsibility for the work stoppage by its refusal to work under the terms and conditions of the expired labor-management agreement without the guarantee that any new agreement would be retroactive. The employer was willing to continue to provide work under the same terms and conditions of the expired agreement, but would not agree to retroactivity. The union's demand of retroactive benefits as a part of any interim agreement cannot constitute a bona fide offer to continue work under the terms and conditions of the expired agreement.

READEX FICHE

problem with this reasoning is it fails apply the *Erie Forge* test. Under that test the focus is upon the actions of the parties "after the contract has in fact expired" and immediately preceding the work stoppage. The assertions, demands, and threats of the parties prior to that time are not to be controlling.[4] Such responses are to be anticipated in the effort to reach agreement before the expiration deadline. What is of concern is which party is responsible for causing the work stoppage once it is evident that the expiration date has been reached and a new agreement has not been signed. The demand for retroactive benefits was prior to that point and thus is of no moment in the analysis.

The reasoning for this view is that the parties are entitled to use all legitimate pressures they can bring to bear during the negotiations. However, in determining the workers' rights to unemployment benefits, entitlement must turn on the actual conduct of the respective sides and not upon the rhetoric of the negotiations.

The testimony reveals a policy decision on the part of management to exclude the millwrights and ironworkers if no contract was signed.[5] A directive to that effect went to the guards manning the construction site entrance gates. On the other hand, no evidence was presented which showed any directive from the unions' leaders to membership instructing them not to report. In fact, the testimony of the business agent for the iron workers, who

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Footnote cont.

> *The employer did deny work to the members of the union at the expiration of the then existing labor-management agreement.* However, it was the union's duty to offer to continue working for a reasonable time under the same terms and conditions of the expired agreement. The union did not meet this duty and responsibility for the work stoppage must be assessed against the union as the party which first refused to maintain the status quo. (Emphasis added.)

Appeal No. B-76-7-D-695 at 4, Appeal No. B-76-7-K-481 at 4.

[3] The Commonwealth Court opined:

> Because of the demand for retroactive benefits by the Millwrights and Iron Workers, as established by the findings of fact, we must conclude that these claimants did not make a bona fide offer to continue work under the preexisting terms and conditions of employment and therefore the work stoppage here must be assessed against these claimants as the ones which first refused to maintain the status quo. (citations omitted). *Borello* v. *Unemployment Corp. Bd. of Review*, at 364, 397 A.2d at 476.

[4] As noted in footnote 1, the exception set forth in *Hershey Estates, supra,* is not here applicable.

[5] This was revealed by the testimony of Townsend and Bottum's construction manager.

Q. But that's not necessarily the way it would come down from the home office, that's the way you have interpreted it in your own mind, is that correct?

A. No, it's come down from the home office that if we don't have a signed contract or a signed interim agreement that does not include retroactivity or in the case of master builders, a telegram telling us that they've reached tentative agreement, to go ahead and work, you don't work them.

* * *

BY THE REFEREE

Q. Any other employer? Let the Referee ask you another question, I'm still trying to get this clear in my mind, Mr. Butcher, let me give you a hypothetical situation and I ask you weigh it heavily before you answer. If labor union X has a contract with your company and this contract expires at midnight May 31 of the year, and there have been absolutely no negotiating sessions prior to the expiration of that contract, no negotiating sessions, the morning of June 1, 1976 all the members of this union show up at the gate, will they be allowed to enter?

A. No, they will not.

(N.T. 547-548).

also acted as negotiator, shows that the workers were affirmatively told to report.[6]

The evidence presented goes on to establish that members of the unions reported for work at the usual time on June 1, 1976, approached the gates to enter the project, and were rebuffed by security guards. In one instance, a union representative (Mr. Jack Doyle), who was able to gain admittance under the guise of a visitor, was tracked down and bodily removed from the premises.[7] An employee of Townsend and Bottum, Inc., who was responsible for the maintenance of security at the gates corroborated the ironworkers' testimony.[8] The exclusion procedure was also explained by another security guard.[9] Finally, the project labor coordinator for the employer admitted that the millwrights and ironworkers were denied entry to the project site on June 1, 1976.

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[6]
Q: Were any ironworkers, who were members of yours, permitted to work on the Bruce Mansfield Project as of June 1, 1976?
A: No.
Q: Had you given any instructions to your members, not to work on that project, as of June 1, 1976?
A: No.

* * *

Q: Were you informed on June 1, 1976, of the efforts of your members to obtain entrance to the plant?
A: Yes.
Q: What did you tell them to do?
A: I told them to go down there and to go to work.
Q: Did you tell them to do the same thing on June 2?
A: Yes, sir.
(N.T. 186, 188)

This procedure was also echoed by the president and business representative for the millwrights.

Q: Were you on strike on June 1?
A: No, sir.
Q: Yet you didn't have a contract?
A: No.
Q: Were you directing your men?
A: The men were instructed to report to work. There was no instructions given to any man not to report to the job sites.
Q: Now we know that you didn't have, with these various contractors, a signed agreement, correct?
A: Correct.
Q: And you didn't have an interim agreement, correct?
A: Correct.
Q: Still under those circumstances you were still willing to offer your services to these employers?
A: Definitely.
Q: After June 1, were you still sending your people back onto the job sites?
A: Correct.
Q: And were they still being refused entrance to these job sites?
A: To the best of my knowledge, yes.
(N.T. 438).

[7]
Q: Did you report to work on Tuesday, June 1st?
A: Yes, sir, I did.
Q: Did the other ironworkers who you made reference to, report to work to your knowledge?
A: To the best of my knowledge, yes, sir, I did not see personally all of them.
Q: How many would you say approximately?
A: Approximately, 50 to 60 men.
Q: What occurred when you came to work on Tuesday, June 1?
A: It was my next scheduled work day.
Q: Were you there to work?
A: Yes, sir.
Q: Did the guard say that he had specific instructions regarding the ironworkers?
A: Yes, he did.
Q: And the instructions were as you told us?
A: Yes.

Q: I'm talking about June 1 and 2, now.
A: Yes.
Q: They were turned away, the ironworkers and millrights?
A: That's correct.
(N.T. 563)

Appellees would have us find that the failure of the millwrights and ironworkers to present, through an authorized union representative, a *written*

Footnote cont.

Q: Did you take any other action on Tuesday, June 1 to try to get into the plant?
A: No, sir, I didn't, I notified my business agent.
Q: Did you thereafter, try to get into the plant?
A: Yes, sir, the following day that would be Wednesday, June 2, I again approached the gate guards and was refused entrance through the construction gates; at that time I went down to the main gate and I signed in as a visitor and I entered the plant.
Q: They let you in as a visitor?
A: Yes, sir.
Q: What happened when you got into the plant as a visitor, sir?
A: I was on the plant for approximately 30 minutes and I was rounded up by the plant security and bodily taken off the job.
Q: When you say bodily taken off the job, would you please describe what happened?
A: They put me in their truck and took me off the project.
(N.T. 173-174)

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Q: I think you have indicated that you know as a fact that the ironworkers and the millwrights did not have a signed contract on June 1, 1976?
A: Right.
Q: Did you then deny access to the working area to those employees?
A: As close as we could, sir.
BY THE REFEREE
Q: In any event, on June 1, 1976, you intended to deny entry to any craft union that did not have a signed contract?
A: Yes, sir.
BY MR. SEGAL
Q: So your testimony would be as you could catch them, any ironworker who appeared or any millwright who appeared, would not be allowed to go into work?
A: Yes, sir.
Q: And they were turned away, is that correct?
A: Yes, sir.
(N.T. 409)

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Q: Who gave you the instructions to remove Mr. Boyle from the job site?
A: Mr. Don Lucas, Pennsylvania Power.
Q: What were the specific instructions?
A: He said, called me on the telephone and says, "Jack Boyle, T & B Ironworkers' steward, is on the job and he says he's not authorized to be here, escort him off. I said as soon as I locate him, I will. I located him, told him he would have to leave the job. I drove him over to the main gate and he left.
(N.T. 414)

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Q: In other words, instead of looking at their cards, mostly you just asked each member as they came through, "What craft do you belong to?" If they said millwright or ironworker, then what would you tell them?
A: We told them they wasn't allowed in this gate.
(N.T. 499)

offer to continue working disqualified the members from receiving benefits. In effect, this would be an attempt to require a commitment that section 402(d) was not designed to elicit. Section 402(d) was not designed to confer a preference at the bargaining table. The evidence presented at the board hearing showed that several representatives and members of the millwrights and ironworkers reported for work on the morning of June 1, 1976. The first contact between the parties following the expiration of the contract reflects that the appellants were willing to continue to work under the terms of the prior agreement and were prevented from doing so by the employer. By so doing, the appellants offered to continue working for a reasonable time under the circumstances, at the preexisting terms and conditions of employment.

Townsend and Bottum, Inc., by specifically directing their security guards to turn away those union members failed to permit work to continue under the same conditions. The evidence overwhelmingly proves that it was the employer who first refused to maintain the status quo, and thus the work stoppage was the result of a lock-out.

Although the weight to be given the evidence and the credibility to be afforded the witnesses are within the province of the board as finder of fact, *Unemployment Compensation Board of Review* v. *Tickle, supra; Shira* v. *Unemployment Compensation Board of Review*, 10 Pa. Commw. Ct. 457, 310 A.2d 708 (1973)[MS-235.4-63, BSSUI], such a body is not free to ignore the overwhelming evidence in favor of a contrary result not supported by the evidence. Here the board's findings are contrary to the corroborated credible testimony and cannot be upheld. The record clearly establishes that the millwrights and ironworkers were locked out and their rights to benefits should not have been foreclosed.

We now turn to the remaining appellants from the craft unions who present a different question for our consideration. When the craft union reported for work on June 3, 1976, they found that the millwrights and ironworkers had established picket lines. Appellee asserts that the craft unions' failure to enter the project that day was caused by their choice to honor the picket lines. We agree that the record amply supports such a view and, as a result, these appellants became "participants in the labor dispute" and thus not entitled to unemployment compensation benefits under the first proviso of section 402(d)[10] Appellants counter with the claim that they did, in fact, cross the picket line only to find the gates locked. Thus, it is asserted that they too were "locked out" and fall within the exclusion of section 402(d).

While the perimeters of honoring a picket line for purposes of section 402(d) is one of first impression for this court, the Commonwealth Court has decided a number of cases which dealt with the question of when it is permissible for a union not to cross a picket line and still recover benefits under section 402(d). These decisions have held that where members of a union voluntarily choose to honor a peaceful picket line, they become participants in the labor dispute and thus ineligible for benefits. *Unemployment Compensation Board of Review* v. *Tickle, supra*. Only where there is a reasonable fear of violence, based on a showing of threats of violence and force on the picket line can a choice not to cross be rewarded with unemployment compensation benefits. *Wright* v. *Com., Unemployment Compensation Board of Review* 45 Pa. Commw. Ct. 375, 405 A.2d 991 (1979); *Unemployment Compensation Board of Review* v. *G. C. Murphy Co.*, 19 Pa. Commw. Ct. 572, 339 A.2d 167 (1975); *Unemployment Compensation Board of Review* v. *Tickle, supra.*

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[10] The provision provides in pertinent part: ". . . Provided, That this subsection shall not apply if it is shown that (1) he is not *participating in* . . . the labor dispute which caused the stoppage of work, . . ." 43 P. S. section 802(d). (Emphasis added).

Testimony was presented from the guards that were on duty that the entrance gates were never locked on the morning of June 3, 1976. The project construction manager told the board that work was available on June 3, but that the "men were not crossing the picket line." Moreover, a craft union member stated in response to questioning, that he was able to and did enter the site to work on June 3, 1976, and, that while the gate was closed, it was not locked. It is conceded by all parties that the pickets behaved in a peaceful fashion at all times. We affirm the Commonwealth Court's interpretation of the 402(d) lockout exception in this regard. The decision to respect the picket line of another, where there is no danger presented, is no different from the judgment to strike. In both situations the legislature has expressed an intention to deny unemployment benefits. The striker and those who band with him are on the same footing, and the legislature has determined that both should be denied benefits under section 402(d).

Accordingly, the Commonwealth Court Order affirming the Unemployment Compensation Board of Review is reversed in part and affirmed in part. That portion of the order denying benefits to the millwrights and ironworkers is reversed and the matter remanded to the board for the entering of an award in accordance with this opinion. That portion of the order denying benefits to the craft union is affirmed.

Mr. Justice Larsen joins in the majority opinion and files a separate concurring opinion.

Mr. Justice Flaherty joins the opinion of the court and also expresses his agreement with the sentiments set forth in the concurring opinion of Mr. Justice Larsen.

Concurring Opinion

LARSEN, R., Justice

I join with the majority opinion. However, I believe there should be an exception to the general rule rendering ineligible for unemployment compensation benefits those employees who refuse to cross a picket line. That exception should allow employees who honor the picket line of locked-out employees to collect unemployment compensation.

Arkansas

SUPREME COURT

April 15, 1980

RANDALL, BURKART/RANDALL DIVISION OF TEXTRON, INC. *v.* CHARLES L. DANIELS, DIRECTOR ARKANSAS DEPARTMENT OF LABOR; HENRY L. MCHENRY, ADMINISTRATOR DIVISION, *et al.*

Termination of labor dispute:
Agreement or arbitration

Labor dispute 445.1

A manufacturer's union, after failing to reach an agreement, went on strike and set up a picket line at the plant. It later accepted an offer of settlement, abandoned all strike activities, and applied unconditionally for reinstatement of striking employees. Although employer contended the offer had been withdrawn prior to acceptance, those for whom jobs were available were reinstated, normal operations resumed, and the balance of employees filed claims. Employer opposed their applications, contending the labor dispute had not ended inasmuch as an agreement had not been reached. *Held,* sufficient evidence present to support conclusion reached that the labor dispute ended when employees returned to work after ceasing strike activities and despite the absence of a collective bargaining agreement, which, at best, is only one factor to be considered as to whether a labor dispute has ended.

RICHARD L. MAYS, Associate Justice

This case arises from a special examiner's award of unemployment compensation to claimants whom the petitioner contends are ineligible because of the "labor dispute" disqualification provision of the Arkansas Employment Security Act (Ark. Stat. Ann. section 81-1101, et seq. [Repl. 1976]). On appeal the award has been sustained by the board of review, the circuit court, and the court of appeals. The case is here on a petition for certiorari, which we granted.

Petitioner, the Randall Company, is a manufacturing concern with a plant in Blytheville, Ark., which employs more than 350 employees who are represented for collective bargaining purposes by the United Automobile Workers, Local 1249. In July of 1977, petitioner began negotiations with the union for renewal of a collective bargaining agreement which expired September 1, 1977. On September 9, 1977, after failing to reach an agreement, the union went on strike and set up a picket line at petitioner's plant. The petitioner submitted an offer of settlement to the union which it first rejected and then accepted by mailgram on October 16, 1977, abandoning all strike activities and applying unconditionally for reinstatement of the striking employees. Although the petitioner contends that the offer of settlement had been withdrawn before the union accepted it, petitioner reinstated all of the striking employees for whom there were available jobs and resumed normal operation. When those striking employees for whom there were no available jobs applied for unemployment compensation for the period after October 16, 1977, petitioner opposed their application, arguing that since the petitioner and the union had not reached an agreement concerning a collective bargaining contract, the "labor dispute" had not ended and, therefore, the claimants were ineligible for benefits.

The petitioner's contention hinges upon the meaning of the term "labor dispute" in the context of the unemployment compensation disqualification provision of the Employment Security Act, which provides at section 4(f) (Ark. Stat. Ann. section 81-1105(f) [Repl. 1976]) as follows:

> If so found by the Director no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment if he lost his employment or has left his employment by reason of a labor dispute other than a lockout at the factory, establishment, or other premises at which he was employed (regardless of whether or not such labor dispute causes any reduction or cessation of operations at such factory, establishment or other premises of the employer), as long as such labor dispute continues, and thereafter for such reasonable period of time (if any) as may be necessary for such factory, establishment, or other premises to resume normal operation . . . .

The general statutory purpose of unemployment compensation is to relieve the worker from the financial hardship of unemployment which he did not cause. Although an inquiry into fault usually precedes any denial of unemployment compensation, the "labor dispute" provision eliminates a need for that inquiry by withdrawing, irrespective of fault, unemployment compensation benefits from those whose unemployment was caused by a labor dispute "as long as such labor dispute continues." Recognizing that unemployment compensation might unnecessarily and inequitably undermine stable labor-management relations and be used to finance a labor dispute, the General Assembly wisely suspended entitlement to unemployment compensation during a labor dispute to preserve the state's neutrality. Since it would be difficult to formulate a definition of "labor dispute" to adequately address every set of facts in which an award of unemployment compensation neither offends our public policy supporting unemployment compensation nor that supporting the labor dispute exception, the legislature deliberately failed to define the term "labor dispute" in the Employment Security Act. Therefore, the meaning of "labor dispute" in the context of the statute must be derived from a case by case approach, harmonizing the factual complexities of labor-management relation conflicts with the underlying public policies.

The petitioner contends that the factual situation involved in this appeal was addressed by this court in *Guinn* v. *Arkla Chemical Corp.*, 253 Ark. 1029, 490 S.W. 2nd 442 (1973). In *Guinn, supra,* when the employer closed his plant during a strike after a "rock bottom" settlement offer from the union, citing adverse economic conditions, the union ceased its strike activites and suspended negotiations with the employer. Claiming that the labor dispute ended when the plant closed and strike activities ceased, the inactive strikers applied for unemployment compensation. They argued that since no jobs were available after the employer closed the plant, they were involuntarily unemployed because they could not return to work even if they wanted to. Perceiving the employer's closing of the plant and the subsequent suspension of negotiations by the union as simply a further manifestation and continuation of the labor dispute, this court held that the labor dispute provision disqualified the claimants since the union and employer had not reached an agreement concerning the terms and conditions under which the employees would return to work if the plant were reopened.

In the situation before us today, the union ceased all strike activities and applied unconditionally for reinstatement of all striking employees even though the employer refused to stand by its last offer of settlement after the union tried to accept it. The employer has resumed normal operation, and no strike participant has refused to return to work when requested by the employer. The special examiner and board of review found that the labor dispute provision did not disqualify claimants from unemployment compensation benefits since the labor dispute had effectively ended. We find that there is substantial evidence to support the decision. When the employer disputed the union's right to accept its offer of settlement, the employees did not renew strike activities or suspend negotiations; they stood by their unconditional offer to return to work. Although the union and employer continue to dispute the terms and conditions under which the employees *should* return to work, there is no dispute about the terms and conditions under which they *will* return to work. When employees in fact return to work after cessation of strike activities induced by a labor dispute, the absence of a collective bargaining agreement between the union and employer is probably irrelevant but is, at best, only one factor which the fact finder has a responsibility to weigh in determining whether a labor dispute has ended for the purposes of unemployment compensation eligibility.

The State has no interest in withdrawing unemployment compensation from strike participants who have unconditionally offered to return to work for an employer who would willingly reinstate them if he had jobs for them. Since the fact finder's decision has an adequate evidentiary base, and the award of unemployment compensation does not offend the public policies underlying unemployment compensation or the labor dispute exception, we cannot disturb the award.

Affirmed.

C. J. FOGELMAN concurs.

J. STRAND dissents.

READEX FICHE

Florida B

Decision of U. A. Commission
March 10, 1980

No. 80-0136

Unemployment due to labor dispute or stoppage of work: Discharge or resignation

Labor dispute 465.1, 245.

Claimant and 15 others, involved in a discussion of working conditions with management, were advised by the plant manager to select a spokesman and submit their grievances in writing following consultation over the weekend. Meanwhile, the plant manager ordered the workers to return to work or "clock out." Claimant and nine others clocked out and congregated in a nearby bowling alley parking lot. Upon return in the afternoon, they were turned away because of having quit, which they denied. *Held*, neither a quit nor a separation for misconduct connected with their work but a termination for engaging in a work stoppage during an active labor dispute. The stoppage was without violence, without property damage, and did not violate any law or labor-management agreement. It ended when the workers were terminated. Claimant's unemployment was not due to a labor dispute in active progress.

Findings of Fact and Reasoning

This cause comes before the commission for disposition of the claimant's application for review pursuant to section 443.07 (4) (c), Florida Statutes, of a decision by the appeals referee wherein the claimant was held disqualified from receipt of benefits.

On September 28, 1979, the claimant and 15 other employees became engaged with management in a group discussion of working conditions with the employer. After the meeting had lasted for more than 30 minutes, the plant manager decided that the discussion had become unproductive. He invited the employees to use the weekend to select a spokesman who could present the grievances in a written, organized form. Thereafter, the manager ordered the employees back to work, saying they must return to work or clock out. The claimant and nine other employees, still acting in concert, clocked out, left the employer's premises and met in a nearby bowling alley parking lot. When they returned in the afternoon, they were told that they had quit their jobs and were no longer employed. They disagreed, but the employer was adamant and so the claimant became unemployed.

The issue before the commission is whether the claimant voluntarily left employment without good cause attributable to the employer or was discharged by the employer for misconduct connected with work within the meaning of section 443.06(1), Florida Statutes.

The referee held that the claimant had voluntarily left his employment without good cause attributable to the employer. The referee's decision is not in accord with the law.

The facts of the instant cause show that the reason for the claimant's separation was that he and coworkers engaged in a work stoppage during an active labor dispute. The stoppage was without violence, without property destruction, and was not in violation of either a law or a labor management agreement. The claimant did not willingly and of his own accord choose to leave his employment, and his actions cannot be considered to be misconduct within the meaning of Florida's unemployment compensation law.

The claimant became unemployed as a result of a labor dispute. The dispute, however, was short-lived. The employer advised the employees that they were no longer employed by the company; the employees accepted that notice as termination; thus, by agreement of the parties, the active progress of the labor dispute ended. The claimant's unemployment commenced because of the labor dispute, but Florida law requires the disqualification of a claimant only with respect to weeks of unemployment resulting from a "labor dispute in active progress." Therefore, the claimant is not subject to disqualification since his continuing unemployment is not due to a labor dispute in active progress.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits.

It is so ordered.

UNEMPLOYMENT APPEALS
COMMISSION
R. CARSON DYAL, *Chairman*
DELOIS BASKIN, *Member*
CHARLIE HARRIS, *Member*

READEX
FICHE

Illinois B

Decision of Board of Review No. 80-BRD-351
January 23, 1980

Absence:
Notice

Misconduct 15.1

A pallet loader, absent from work for 3 days allegedly without notice, contended he reported his first day's absence. He was incarcerated during this period, did not know incarceration would be for more than 1 day when he called, and was not allowed to call thereafter. Old traffic warrants, for which he was charged, were found on the second day. His wife did not call employer because of preoccupation with securing his release. *Held*, not discharged for misconduct connected with his work since his absence had been for compelling reasons beyond his control. He did not willfully or wantonly disregard employer's interests nor had he been so grossly negligent as to infer willfullness or wantonness.

Findings of Fact and Reasoning

This is an appeal by the claimant from a referee's decision, dated September 5, 1979, which reversed the claims adjudicator's determination and held that the claimant was subject to disqualification of benefits from May 13, 1979, through June 23, 1979, under the provisions of section 602A of the Unemployment Insurance Act.

We have carefully reviewed the record of the evidence and the transcripts of the testimony submitted before the referee at hearings conducted on August 9, 1979, for the claimant, and on August 27, 1979, for the employer, at which times the respective parties appeared. The record is adequate and we do not deem it necessary to take additional evidence.

The record discloses the following facts. The claimant is a 30-year-old married man. He worked for the employer as a pallet loader on the third shift approximately 1 year until May 10, 1979, earning a wage rate of $5.89 per hour. He was discharged. The representative of the employer testified that the claimant was discharged because he failed to report his absences on May 8, May 9, and May 10, 1979. The claimant testified that he was incarcerated during that period and, although he reported his first absence, he did not report the others. The claimant stated, "I did not have any idea when I called that I would be in there 3 days, so I only called off that first night." On the second day of his incarceration, old traffic warrants were found for which he was charged, but he was not allowed to make a second call. His wife, occupied with attempts to obtain the necessary money to pay the traffic fines and secure his release from jail, did not call the employer.

The issue presented to the board of review is whether the claimant was discharged for misconduct connected with his work. Section 602A of the Unemployment Insurance Act provides as follows:

> SECTION 602. DISCHARGE FOR MISCONDUCT. A. An individual who has been paid wages within each of at least 3 calendar quarters of his base period for insured work shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until whichever of the following shall first occur: (1) He is not an 'unemployed individual' as defined in Section 239 by reason of having accepted bona fide work; or (2) 6 consecutive weeks have elapsed which begin on the first day of the first week with respect to which he has filed a claim.

"Misconduct," to be disqualifying under the statute, must be connected with the work and must be a deliberate act or an intentional omission of an act on the part of the worker which constitutes a breach of his duties and obligations to his employer. An employer has the right to promulgate reasonable rules for the conduct of his workers and to expect that they will abide by these rules unless prevented by circumstances beyond their control. The employer may expect employees to come to work regularly and on time and not to absent themselves from their duties frivolously or capriciously. Absence from work without justification, or with justification but without adequate notice, may constitute misconduct within the meaning of the statute. However, a violation of an employer's rules does not automatically constitute misconduct.

In the case before us, the claimant was absent from work because he was arrested and incarcerated for several days. He notified the employer of his absence on the first day, but did not specify the circumstances because he did not anticipate a prolonged period of incarceration until additional charges were made against him on the following day, after which time he was not allowed to make additional telephone calls. Although the evidence discloses that the claimant had been absent from work on a number of previous occasions and the employer may very well have been justified in dispensing with his services for this reason, a discharge for justifiable reasons is not necessarily synonymous with "misconduct." The claimant's most recent absences from work were due to compelling circumstances beyond his control. Based upon his uncontroverted testimony that he had telephoned the employer on the first day of his incarceration, without having a reasonable basis to anticipate that the incarceration would be for a prolonged period, we cannot find that he willfully or wantonly disregarded the employer's interests or that he was so grossly negligent that willfulness or wantonness can be attributed to him. Accordingly, we find that the claimant was discharged for reasons other than misconduct connected with his work. He was, therefore, not subject to a disqualification of benefits under the provisions of section 602A of the Act.

The claimant was eligible to receive benefits, provided that the claims adjudicator finds that he was able to work, available for work, and actively seeking work, as required under section 500C of the act.

The decision of the referee is reversed, with the above provision.

BOARD OF REVIEW OF THE
DEPARTMENT OF LABOR
DENNIS H. BLOCK, *Chairman*
EUGENE E. CHRISTY, *Member*
DAVIDE W. TOMEI, *Member*

Virginia B

Decision of Commission
(Special Examiner)
January 9, 1980

No. 12753-C

Connection with work

Misconduct 85

A ship welder, returning from picket duty at employer's establishment, was arrested and convicted of disorderly conduct following an altercation with city and State police after being observed blocking a car's passage through an intersection. *Held*, not discharged for misconduct connected with work since facts were absent showing the origin or destination of the vehicle, identity of driver, or how claimant's actions against the vehicle and driver injured employer. Without such facts, a connection between the cause of discharge and employment could not be established.

Findings of Fact and Opion

A shipbuilding firm was the claimant's last employer, for whom he worked from June 3, 1977, through June 14, 1979. He was employed as a welder and at the time of his separation was earning $6.57 per hour.

While returning from picket duty at his employer's establishment on April 16, 1979, the claimant was involved in an altercation with the Newport News City Police and the Virginia State Police at the intersection of Washington Avenue and 34th Street. This altercation resulted when the claimant was observed by a police officer blocking a vehicle's passage through the intersection. Because of this incident, the claimant was arrested and convicted of disorderly conduct in General District Court.

The claimant was discharged by his employer because of the aforementioned events.

Section 60.1-58 (b) of the Code of Virginia provides a disqualification if it is found that a claimant was discharged for misconduct in connection with his work.

The Virginia Supreme Court has applied interpretive language to this section of the Virginia statute by stating:

> In our view an employee is guilty of "misconduct connected with work" when he *deliberately* violates a company rule reasonably designed to protect the legitimate business interests of his employer or when his acts or omissions are of such a nature or so recurrent as to manifest a *willful* disregard of those interests and the duties and obligations he owes his employer. *See generally,* 76 Am. Jur. 2d *Unemployment Compensation* Section 52 (1975). Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits," and the burden of proving mitigating circumstances rests upon the *employee. "Branch* v. *Virginia Employment Commission and Virginia Chemical Company*, 219 Va. 609, 248 S.E. 2d 180 (1978).

There is no question this claimant was discharged for an act of misconduct, and that this misconduct was the proximate cause for the termination. The case, therefore, turns on whether or not the act of misconduct was connected with his work. The record is void of any evidence or testimony to show the origin or destination of the vehicle, the identity of the driver, or how the claimant's actions against the vehicles and its driver caused injury to the business interest of the employer. Absent such evidence, a sufficient nexus between the cause of discharge and the employment cannot be established.

The case of *Madelyn B. Spigener* v. *Coronet Casuals, Incorporated*, Commission Decision No. 6018-C, dated July 3, 1973, cited by counsel for the employer, is distinguishable from the case before the commission inasmuch as the facts in that case clearly showed the claimant interfered with cars attempting to enter or leave the employer's premises. No such showing has been made in this case.

Accordingly, the commission must conclude that the claimant was discharged for reasons which have not been shown to constitute misconduct in connection with his work within the meaning of that term as used in the Virginia act.

Decision

The decision of the appeals examiner disqualifying the claimant for having been discharged due to misconduct in connection with his work is hereby reversed.

It is held that no disqualification should be imposed in connection with the claimant's separation from his last employment.

The deputy is directed to promptly examine and determine the claimant's eligibility for benefits during the weeks he has claimed.

JOSEPH L. HAYES
Special Examiner

Rhode Island

DISTRICT COURT
SIXTH DIVISION

June 6, 1980

ROBERT MARCHAND *v.* ALBERT FASCIO, *et al.*, BOARD OF REVIEW OF D.E.S.

Insubordination:
Vulgar or profane language

Misconduct 255.4

An employee, observing a fellow union activist (who was eventually suspended) being escorted from the building by several supervisors, left his work area and verbally abused his friend's supervisor, using extremely offensive language. *Held*, discharged for misconduct since claimant had violated a standard of behavior that his employer had a right to expect. No provocation was directed against the employee or his friend to justify his action.

Facts and Reasoning

MCOSKER, J.

This case is before the court under G.L. 1956 (1979 Reenactment) section 28-44-52, on appeal from a decision of the board of review of the Department of Employment Security. The board of review upheld a decision of the appeals tribunal finding that the plaintiff was discharged for proved misconduct under G.L. 1956 (1979 Reenactment) section 28-44-18, and therefore was disqualified from receiving unemployment benefits until such time that he had 4 weeks of work with earnings of at least 20 times the minimum hourly wage.

The scope of review is governed by G.L. 1956 (1977 Reenactment) section 42-35-15(g). This section states that the court is prohibited from substituting its judgment for that of an agency as to the weight of the evidence on questions of fact. Reversal or modification of an agency decision is permitted only if substantial rights of the plaintiff have been prejudiced because the administrative findings, conclusions, or decisions are

> (1) in violation of constitutional or statutory provisions;
> (2) in excess of the statutory authority of the agency;
> (3) made upon lawful procedure;
> (4) affected by other error of law;
> (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The findings and conclusions of the Department of Employment Security are as follows:

> [T]he facts show that the claimant did leave his work area, approached a group of supervisors who were escorting his friend from the building, and that he did use abusive language to the friend's supervisor. This we find would constitute an intentional and deliberate act well outside the scope of the claimant's responsibilities as an employee and as such would constitute misconduct within the meaning and intent of the Rhode Island Employment Security Act.

The court has reviewed the transcript of the hearing that the plaintiff received at the Department of Employment Security. By the plaintiff's own admission, he approached a supervisor and made a highly offensive remark

READEX FICHE

to him, presumably in front of the other workers. The issue before this court is whether an offensive vulgar remark made to a supervisor constitutes misconduct within the meaning of section 28-44-18 and thus renders the plaintiff ineligible for unemployment benefits.

The Supreme Court of Rhode Island has not decided this issue; however, the issue has arisen in other jurisdictions. The prevailing standard concerning misconduct is derived from the case of *Boynton Cab Company* v. *Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941) [V4-8, 201, BSSUI]. The Wisconsin Supreme Court concluded that the intended meaning of the term "misconduct" is as follows:

> . . . limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or employee's duties and obligations to his employer . . . .[1]

This court is of the opinion that the actions by the plaintiff here fall within the first part of the above cited standard, in that an offensive vulgar remark to a supervisor is a willful violation of the standards of behavior which the employer has the right to expect of his employees. It is true, however, that not all instances of vulgar and offensive language addressed to a supervisor will constitute misconduct so as to justify the denial of unemployment benefits. For example, in *Penn Unem. Comp. Bd. of Review* v. *Boff*, 357 A.2d 694 (1976), the court concluded that it is not considered misconduct generally if there has been justifiable provocation. Further, in *Fields* v. *Penn Unempl. Comp. Bd. of Review*, 7 Pa. Comm. 200, 300 A.2d 310 (1973), the court found that a vulgar remark will not constitute misconduct unless it was unjustified, unprovoked, unnecessary, and uncalled for under the circumstances. However, these cases make clear that the determination of whether the particular vulgar remark constitutes misconduct so as to disqualify the employee for unemployment benefits must be left to the sound discretion of the unemployment compensation board which can judge credibility and weigh the evidence.

The court concludes that the decision of the board of review was not clearly erroneous in view of the evidence or characterized by an abuse of discretion. The question of whether the particular vulgarity involved rose to the level of misconduct is a question of fact, and the court is prohibited from substituting its judgment for that of the board pursuant to section 42-35-15(g). A review of the record reveals that the remark made by the plaintiff was of an extremely offensive nature. Further, there is no question concerning whether it was actually made since plaintiff freely admits having said it. Additionally, the plaintiff's reason for having made the remark—that his friend, a fellow union activist, was being suspended—is not sufficient provocation to warrant reversal of the board's findings. Provocation sufficient to justify making a vulgar remark to a supervisor must be directed at the employee and not at a third individual. For example, in *Longacre* v. *Penn. Enempl. Comp. Bd. of Review*, 12 Pa. Comm. 176, 316 A.2d 110 (1974) [MC-255.4-21, BSSUI], the court found that the offensive language was provoked by the actions of a supervisor in grabbing the employee's arm, and thus, the employee's remark did not constitute misconduct. In the present case, there were no actions taken by supervisory personnel directed at the plaintiff which could amount to sufficient provocation for the offensive and vulgar remark.

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[1] This standard was favorably embraced in a bench decision by Justice Weisberger in the superior court case of *Bromley* v. *Board of Review of D.E.S.*, Sc. No. 72-401. As reported in (1972) UNEMPL. INS. REP. (C.C.H.) section 42,860 [MC-300.1-47, BSSUI].

In conclusion, employers have the right to expect certain standards of behavior from their employees. It is the decision of the court the board did not err in finding that the plaintiff violated these standards. It would be unwise for the courts to allow individuals to terminate their employment by using offensive language toward their employers, and thus qualify for unemployment compensation benefits. The order of the board is hereby affirmed. Counsel may prepare and submit an order in conformity with the decision.

Washington A

Decision of Appeal Examiner No. 9-07022
July 20, 1979

Violation of company rule:
Manner of performing work

Misconduct 485.55

Claimant, employed as a security guard by a grocery distributor, was discharged as a result of a surveillance report submitted by an outside security agency investigating thefts of cigarettes from employer's warehouse. The report disclosed observing claimant "dry-firing a nickel-plated revolver nine times; he was photographed in the process of reloading his pistol. The security guard then placed the loaded gun in his left front pocket . . . ." Claimant was aware that carrying a weapon violated a company rule. However, he testified that he heard a noise in the warehouse one night and knew about the theft of cigarettes from the warehouse. He obtained from his car a nickel-plated 22-caliber revolver, which he described as a souvenir piece with the firing pin removed. He entered the warehouse and waved the gun around—intending to scare anyone inside and to show his readiness to shoot. Afterward he returned the gun to his car. *Held*, while his action was an error in judgment, it was not considered misconduct since the gun, being inoperable, arguably was not a weapon.

Findings of Fact

The claimant was last employed for 1½ years as a security guard with a grocery distributor. He worked fulltime and earned $6.25 per hour.

During the spring of 1979, the employer's warehouse, where the claimant was a security guard, apparently had been having problems with the theft of cigarettes. The employer decided to hire an outside security agency to conduct surveillance at the warehouse where the cigarettes were stored. The warehouse was under surveillance from April 2 through April 8, 1979.

The individual conducting the surveillance submitted a report to the employer indicating that on April 5, 1979 , he observed the claimant "dry-firing a nickel-plated revolver, 9 times, he was photographed in the process of reloading his pistol. The security officer then placed the loaded gun in his left front pocket . . . ."

The claimant had a meeting with the supervisors on May 2, 1979, to discuss the allegation. This is the first time the claimant was confronted with the allegation. On May 2, 1979, he was placed on suspension and on May 4, 1979, was discharged from his employment, for having carried a weapon on April 5, 1979.

The claimant was aware that it was against company rules for any of the security guards to carry a weapon. He testified that he had a nickel-plated, 22-caliber revolver with the firing pin removed. He testified that on the night in question, he had heard noise in the warehouse. He also was aware that cigarettes had been stolen from that warehouse. Consequently, he took his revolver, which he described as a souvenir piece, out of his car and carried it with him into the warehouse. He testified that he took the revolver out and waved it around, indicating that if anyone was in the warehouse he was ready to shoot them. He testified that he thought this would scare anybody that was waiting in the warehouse to steal cigarettes. Claimant testified that after this incident, he returned the "souvenir piece" to his automobile.

READEX FICHE

Conclusions of Law

The provisions of RCW 50.20.060 (section 5, chapter 33, laws of 1977, 1st ex. sess.) and WAC 192-16-017 are applicable and will be found on the attachment, together with an excerpt from the Wisconsin Supreme Court case, *Boynton Cab Co.* v. *Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941) [V4-8, 201, BSSUI], which sets forth a definition of the term "misconduct" which is applicable to the Washington statute. *Boynton* was approved by *Willard* v. *ESD*, 10 Wn.App. 437, 517 P.2d 973 (1974).

At the outset of the tribunal points out that, absent a collective bargaining agreement or statutory proscription, an employer has the virtually unqualified right to fire an employee when he pleases and for what reasons he pleases. Thus, this decision in no way questions whether the decision to discharge was wise or unwise, justified or unjustified. The mere fact that an employer has deemed it expedient, desirable, or necessary to discharge an employee does not conclusively prove that the actions or inactions of the employee which led to the discharge constituted willful or wanton misconduct. Misconduct must be established by the preponderance of the evidence and the party alleging the existence of misconduct has the duty of establishing same.

There was no question that what the claimant had with him was what appeared to be a chrome-plated pistol on the evening of April 5, 1979, when he was conducting his security rounds. However, the claimant's testimony that this was an inoperable 22-caliber pistol, and therefore arguably not a weapon, is unrebutted. It is held that the claimant's action on April 5, 1979 was an error in judgment but was not misconduct as defined in RCW 50.20.060.

Decision

The determination under appeal is *set aside*. The claimant is not subject to disqualification pursuant to RCW 50.20.060.

RICHARD A. KNUTSON
Appeal Examiner

NOTE: Appeal by employer follows.

Washington B

Decision of Commissioner's Delegate 9-07022
October 12, 1979

Violation of company rule:
Manner of performing work

Misconduct 190.15, 485.55

As a result of further appeal, the following decision ensued:

Adopting the findings of fact and conclusions of the appeals tribunal, it was further noted that the surveillance report was hearsay in nature since the person making it was not present to testify under oath, subject to cross-examination and rebuttal. Claimant denied the report's allegations, and there was no substantial evidence that the gun was loaded. Considering the unrefuted testimony that the gun could not fire, the possible harm resulting from the claimant's actions would be himself—assuming the noises he heard came from unauthorized persons in the warehouse. Although he violated company rules by carrying the weapon on the premises and, thus, used poor judgment in endangering himself, his only apparent motive was protection of company property. Therefore, he was not terminated for misconduct.

The employer, a grocery distributer, petitioned the commissioner for a review of a decision of an appeal tribunal entered in this matter on July 20, 1979, and the undersigned, having carefully reviewed the entire record, does hereby adopt the findings of fact and conclusions of the appeal tribunal subject to the following.

We address our comments particularly to point 3 of the letter in support of the petition for review. The report of the surveillance operative, admitted as exhibit 9, is in the nature of hearsay since that individual was not personally present to give testimony under oath subject to cross-examination and rebuttal. That report alleges that the claimant dry-fired the "revolver" nine times, then reloaded the "pistol." (A minor point, but our dictionary contains different definitions for revolver versus pistol.) The claimant, under oath, denied "reloading" the gun. There is no substantial evidence that the gun was loaded at any time while claimant had it on the employer's premises. He did acknowledge "clicking" the gun and waving it around to scare anyone who might be inside the premises. A number of questions were asked the claimant by an employer representative to the effect that, what good would it do claimant to dry-fire the gun since all that would do would show possible intruders that the gun was empty. Claimant's consistent reply was that he felt that the action would frighten any possible intruders.

The point of the foregoing is that the unrefuted testimony is that the gun could not fire; therefore, the most direct harm that would come to anyone by claimant's acts with the gun was to the claimant himself, if the noises he heard were in fact due to unauthorized personnel within the premises. We agree with the employer that claimant violated company rules by carrying the gun on the premises. He assuredly demonstrated poor judgment in potentially placing himself in danger. But the only apparent motive for so doing was protection of company property for the benefit of the employer. As such, claimant cannot be guilty of misconduct under the standard for misconduct adopted by the courts (a copy of which was attached to the appeal tribunal's decision).

Accordingly, it is hereby ordered that the decision of the appeal tribunal

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entered in this matter on the 20th day of July, 1979, shall be *affirmed*. The claimant is not subject to denial pursuant to the provisions of RCW 50.20.060 and benefits are accordingly allowed, provided he is otherwise qualified and eligible therefor.

PATRICIA L. STIDHAM
Commissioner's Delegate

California B

Decision of Appeals Board
March 25, 1980

No. 80-466

Misrepresentation:
Fraudulent

Miscellaneous 340.1

Claimant, who had a drinking problem, admitted receiving benefits and failing to report earnings because he was under the influence of alcohol. *Held*, waiver of overpayment reversed and liable since, although intoxication has a bearing on the capacity to form intent (including fraudulent intent), an individual's state of mind does not protect him from the consequences of his acts. Even a person of unsound mind is civilly liable for wrongs committed. Thus, he is "at fault" regardless of ability to form a specific intent—evidence of drunkenness, for instance, supporting conclusion of negligence and/or gross negligence.

Statement of Facts

We adopt the administrative law judge's statement of facts. (Claimant worked 2 successive days or 15 hours. He had been a member of Alcoholics Anonymous for 3 years and a psychiatric patient then. He admitted receipt of benefits and failure to report earnings because he had been drinking.)

Reasons for Decision

We adopt all but the final paragraph of the administrative law judge's reasons for decision and add the following:

To hold, as the administrative law judge did, that a claimant is without fault when he makes a misstatement to the department while under the influence of alcohol goes beyond any authority laid down by this board and is contrary to the general law.

Although intoxication clearly has a bearing on the capacity to form an intent, including a fraudulent intent, a person's lack of a particular state of mind does not insulate him from the consequences of his acts. Thus, even a person of unsound mind, of whatever degree, is civilly liable for a wrong done by him. (Civil Code, section 41, codifying the common law rule. See *Mullen* v. *Bruce* (1959), 168 Cal. App. 2d 494, 496). He is "at fault," in other words, regardless of his ability to form a specific intent. The "fault" of a person who may not have been able to form a specific intent is even enhanced if this is so because of alcohol, as evidence of drunkenness may be offered to show negligence and even gross negligence (*Gombos* v. *Ashe* (1958), 158 Cal. App. 2d 517).

We think that the claimant must be considered to have been at fault in making misstatements to the department. In such circumstances section 1375 of the code does not permit the overpayment to be waived, and the claimant is therefore liable to repay it.

Decision

The decision of the administrative law judge is modified. That portion of the decision holding the overpayment to be waived is reversed. The claimant is liable to repay the overpayment of $92. In all other respects the administrative law judge's decision is affirmed.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
MARILYN H. GRACE
DON BLEWETT
LORETTA A. WALKER

Pennsylvania

U.S. COURT OF APPEALS
THIRD CIRCUIT

July 1, 1980

JOSEPH WILKINSON, *et al. v.* MAURICE ABRAMS, *et al.*

Payment of benefits when due:

Procedure 350, 195.

Claimants challenged the Labor Department's regulation which stated that second-level appeals in State unemployment insurance programs must be decided "with the greatest promptness that is administratively feasible" on the ground that the regulation condoned undue delays in adjudication of such appeals. *Held*, not so, and that the regulation was rational, consistent with the Social Security Act, and valid under the due process clause.

NOTE: Because of its relevancy in the area of second-level appeals, the earlier Neal case, which follows this one, has been reprinted in full. It first appeared in the March 1979 issue of the Benefit Series.

GERRY, JOHN F., District Judge

This is an appeal from the order of the Commonwealth district court which granted the U.S. Secretary of Labor's motion for summary judgment and denied the cross-motion of the plaintiff class for summary judgment. This court has subject matter jurisdiction of the claims of the plaintiff class against the Secretary of Labor pursuant to 28 U.S.C. section 1331.[1]

At issue on this appeal is the validity of a regulation promulgated by the Secretary of Labor (Secretary) concerning the administrative appeal procedures utilized by State governments in State unemployment compensation programs which receive Federal financial assistance. The appellants consist of a class of all persons (*Wilkinson* class) who have filed or will file appeals to the Pennsylvania Unemployment Compensation Board of Review (board of review) from referee decisions denying them unemployment compensation benefits and who will wait in excess of 60 days from the initiation of their appeal until a final decision of the board of review.[2] They challenge a regulation of the Secretary which states that such second-level appeals within State unemployment compensation programs must be decided "with the greatest promptness that is administratively feasible." 20 C.F.R. section 650.3(a). The *Wilkinson* class contends that this regulation condones or fosters undue delays in the processing and decision of second-level administrative appeals in State unemployment compensation programs. Plaintiffs raise three basic arguments: (1) that the regulation promulgated by the Secretary is invalid because it lacks a rational basis and because it fails to comport with the purpose of the Social Security Act, 42 U.S.C. sections 501-504, insofar as that Act applies to State unemployment compensation programs; (2) that the Secretary is obligated by section 303 of the Act, 42 U.S.C. section 503, to promulgate regulations establishing specific timeliness criteria for the prompt processing of second-level unemployment compensation appeals; and (3) that the Secretary's current regulation and his failure to promulgate a more definite regulation have deprived the *Wilkinson* class members of due process rights guaranteed by the fifth amendment. The Secretary argues that this case is moot because there are no longer any delays in the processing of second-level appeals in Pennsylvania. Alternatively the Secretary argues in favor of the validity of his current regulation.

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[1] Although plaintiffs alleged as additional bases of subject matter jurisdiction 28 U.S.C. sections 1337 and 1361, we do not address the propriety of invoking jurisdiction under these additional statutory sections.

[2] On November 9, 1976, the district court certified this case as a class action consisting of all members of the following four subclasses:

(1) All persons who have filed or who will file an appeal to the Unemployment Compensation board of review from a referee decision denying them unemployment compensation benefits pursuant to an intrastate claim, and who have waited or who will wait in excess of sixty (60) days from the filing of their notice of appeal for a decision to be issued by the board of review (exclusive of any time consumed by any request(s) for continuance(s); (2) all persons who have waited or who will wait in excess of fourteen (14) additional days for a reconsideration decision; (3) all persons who have waited or who will wait in excess of thirty (30) days for a final decision by the board following a decision to remand to a referee for the taking of additional testimony; and (4) all persons who have waited or who will wait in excess of fourteen (14) days following a final favorable board decision to receive their benefits.

Only those plaintiffs who are members of the first subclass are before this court on appeal. Brief for Appellants at 4.

We conclude that this case is not moot. Our review of the Secretary's current regulation convinces us that it is rationally founded and consistent with the purposes of the Social Security Act. Moreover, the regulation is not infirm under the due process clause. In our view, neither the Social Security Act nor the due process clause requires the Secretary to promulgate the more specific regulations urged upon us by the appellants. We will therefore affirm the order of the district court which granted the Secretary's motion for summary judgment and denied the cross-motion by the *Wilkinson* class for summary judgment.

I

A. The Social Security Act ("Act") establishes a Federal program designed to assist States in the administration of their unemployment compensation programs. Under the act, 42 U.S.C. sections 501-504, States whose programs satisfy certain requirements set forth in the act qualify for Federal funding. These funds are used to pay the costs of administering the State's unemployment compensation program. *Id.* section 502. The Secretary of Labor is responsible for monitoring funding to the States. No grant may be made to a State for a fiscal year unless the Secretary certifies the amount to be paid. 42 U.S.C. section 502(a). The Secretary may not certify payment of Federal funds unless he first determines that the State's program conforms to Federal requirements. In particular, section 303(a) of the act, 42 U.S.C. section 503(a), requires that the State provide certain procedural safeguards for individuals submitting claims for benefits under the State's unemployment compensation program. That section provides in pertinent part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
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> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and
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> * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . .

42 U.S.C. section 503(a)(1)(3). The Secretary is required to stop certifying payments if he finds that the State in administering its program fails to "comply substantially" with these procedural requirements. 42 U.S.C. sec-

tion 503(b)(2). No further certification of payments may be made until the Secretary is satisfied that the failure has been corrected. *Id.* section 503(b).

Pennsylvania, which receives Federal funding for its unemployment compensation program pursuant to the act, provides two levels of administrative review for individuals whose claims for unemployment compensation are denied. Pa. Stat. Ann. tit. 43, sections 751 *et seq*. After an initial determination denying benefits is made by the Department of Labor and Industry of the Commonwealth of Pennsylvania (department) on the basis of submitted written information, *id.* section 821, an unsuccessful claimant may appeal this determination to a referee of the board of review. At this stage, known as a first-level appeal, the claimant is given an "opportunity for a fair hearing," *id.* section 822, which includes an evidentiary hearing with the rights to be present with counsel, to present evidence, and to cross-examine witnesses. 34 Pa. Code section 101.86. The referee, in a written decision, will then affirm, modify, or reverse the department's fact findings and determination. Pa. State. Ann. tit. 43, section 822. Although further administrative review is not required as a prerequisite to Federal funding under section 303 of the act, 42 U.S.C. section 503, Pennsylvania, as is the case with many States, provides for a second-level appeal from the referee's decision directly to the board of review.[3] The board of review may affirm, modify, or reverse the decision of the referee, either on the basis of the record below or after taking additional evidence. Pa. State Ann. tit. 43, section 824. An aggrieved claimant may then seek judicial review in the Commonwealth Court of Pennsylvania. 42 Pa. Cons. Stat. Ann. sections 673, 5105(a)(2); 34 Pa. Code sections 90, 101.111, 101.112. Any determination of the department, referee, or board of review from which an appeal is not taken becomes the final administrative determination. Pa. State. Ann. tit. 43, section 829.

The regulation under attack here is one of several dealing with the promptness with which States must complete their administrative review of claims for unemployment compensation benefits to comply with the procedural safeguards required by section 303 of the act, 42 U.S.C. section 503. 20 C.F.R. sections 650.1-650.5. These regulations state that the Secretary interprets sections 303(a)(1) and (a)(3) to require, as a condition of funding, that a State establish provisions mandating the issuance of decisions in administrative appeals affecting benefit rights with the "greatest promptness that is administratively feasible." 20 C.F.R. section 650.1(b).[4] The regulations further state that the Secretary's interpretation applies to both first- and second-level administrative appeals. 20 C.F.R. section 650.1(d). Thus, the regulations require that second-level appeals be decided with the

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[3] According to the Federal defendants, at the present time only three States, Hawaii, Nebraska, and New Hampshire, do not provide for second-level administrative appeals in their unemployment compensation programs. Ohio has adopted a second-level appeal system whereby a claimant may be denied access to a second level hearing without receiving any reason for the rejection. Affidavit of Robert B. Edwards, February 6, 1979, section 9.

[4] More specifically, 20 C.F.R. section 650.3 provides:

(a) The Secretary interprets sections 303(a)(1) and 303(a)(3) above to require that a State law include provision for—

(1) Hearing and decision for claimants who are parties to an appeal from a benefit determination to an administrative tribunal with the greatest promptness that is administratively feasible, and

(2) Such methods of administration of the appeals process as will reasonably assure hearing and decision with the greatest promptness that is administratively feasible.

(b) The Secretary interprets section 303(b)(2) above to require a State to comply substantially with provisions specified in paragraph (a) of this section.

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"greatest promptness that is administratively feasible." With respect to first-level appeals, the Secretary has provided specific guidelines concerning State compliance with the Secretary's requirements. *Id.* section 650.4(b). The regulations do not establish specific percentage criteria for second-level appeals.

B. This appeal arises out of two companion suits filed as class actions in the Eastern District of Pennsylvania, each seeking declaratory and injunctive relief against those officials of the Commonwealth of Pennsylvania (commonwealth defendants) and the United States Department of Labor (referred to variously as "Federal defendants" or "Secretary") who are involved in the administration of Pennsylvania's unemployment compensation program. *Hower* v. *Smith*, No. 76-2063 (E.D. Pa., filed July 1, 1976); *Wilkinson* v. *Abrams*, No. 76-1932 (E.D. Pa., filed June 30, 1976). *Hower* challenged the defendants' administration of Pennsylvania's first-level unemployment compensation appeals before the referee. *Wilkinson*, from which this appeal is taken, attacked the defendants' administration of Pennsylvania's second-level appeals before the board of review. Specifically, those two cases challenged the failure of the Commonwealth defendants to render prompt decisions at both the first and second levels of administrative review and the failure of the Secretary to promulgate regulations which would adequately insure that the Commonwealth defendants promptly processed appeals at both levels. The *Hower* class complained that the Secretary's current regulations relating to first-level appeals were ineffective because they did not require 100 percent compliance within any particular period of time. The *Wilkinson* class contended that insofar as the regulations related to second-level appeals, they were insufficient because they provided no specific percentage guidelines at all. Both the *Hower* and *Wilkinson* classes challenged the actions of the commonwealth and Federal defendants on statutory and constitutional grounds.

The claims against the Commonwealth defendants in both cases have been settled as a result of stipulations of dismissal entered into between the commonwealth defendants and the *Hower* and *Wilkinson* plaintiffs. These stipulations, which were approved by the district court and adopted as court orders on April 25, 1977, provided specific timetables for rendering decisions in first- and second-level appeals. The stipulations further provided that once these timetables were complied with for 6 consecutive months, the stipulations would expire. Until such time, the court would retain jurisdiction over the actions between the stipulating parties.

By February 1978, the Commonwealth defendants had achieved compliance with the terms of the *Hower* stipulation.[5] On August 7, 1978, the district court granted a motion by the Commonwealth defendants, in which the *Hower* plaintiffs had joined, to recognize the expiration of the *Hower* stipulation. Because the stipulated schedule for processing second-level appeals was found to be unrealistically optimistic, the stipulation in the

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[5] This stipulation required the commonwealth defendants to issue first-level appeal decisions at the rate prescribed by the Secretary's regulation. 20 C.F.R. section 650.4(b). As noted earlier, this regulation requires that 60 percent of all first-level appeals be disposed of within 30 days and 80 percent within 45 days. We have been informed that in 1977 first-level appeals in Pennsylvania were processed at a rate of 66.3 percent within 30 days and 79.1 percent within 45 days. In 1978, these figures improved: From January through March, 1978, 72.2 percent were processed within 30 days and 86.9 percent within 45 days; from April through June, 1978, 69.7 percent were processed within 30 days and 86.6 percent within 45 days. Plaintiffs' Motion for Summary Judgment, Exhibits F, G, H.

Wilkinson case was amended in February 1979 (amended stipulation). The amended stipulation altered the original timetable to require that the board of review decide 65 percent of all second-level appeals within 75 days.[6] By May 1, 1979, the Commonwealth defendants had been in compliance with the terms of the amended stipulation for 8 months, and the *Wilkinson* plaintiffs, together with the Commonwealth defendants, filed a joint motion to recognize the expiration of the amended stipulation.[7] This motion was granted and the action, insofar as it sought relief against the Commonwealth defendants, was dismissed by the district court on July 6, 1979. As a result, only the Federal defendants were left in each action.

On the same day, the district court granted pending summary judgment motions filed by the Federal defendants in both cases; cross-motions by the *Hower* and *Wilkinson* plaintiffs for summary judgment were denied, and the two actions were dismissed. In granting the Federal defendants' motions, the district court upheld the validity of the Secretary's existing regulations governing first- and second-level administrative appeals. This appeal was taken by the *Wilkinson* plaintiffs from the district court's ruling insofar as it upheld the validity of the Secretary's regulation concerning second-level appeals. The *Hower* plaintiffs, whose claims related to first-level appeals, have not appealed from the district court's order. We are thus called upon to review only the Secretary's regulation governing second-level appeals.

II

The Secretary argues that this case is moot because the amended stipulation entered into between the *Wilkinson* class and the Commonwealth defendants has had the consequence of eliminating delays in the processing of second-level appeals taken to the board of review. Although the amended stipulation expired according to its terms, and the case against the Commonwealth defendants was dismissed on July 6, 1979, the board of review has since that time voluntarily complied with the time specifications for processing second-level appeals set forth in the amended stipulation. Despite this commendable behavior by the board of review, this appeal from the order terminating the litigation between the *Wilkinson* class and the Secretary is not moot.[8]

Mootness doctrine is predicated upon the proper function of the judiciary in deciding cases brought before it. In *California* v. *San Pablo & T.R.R.*, 149 U.S. 308, 314 (1893), the Supreme Court explained:

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[6] In the original *Wilkinson* stipulation for dismissal, the Commonwealth defendants agreed to process 60 percent of all second-level appeals within 60 days. Supp. Appendix, p. 14, section 23(a).

[7] While in 1977 only 45 percent of Pennsylvania's second-level appeals were processed within 75 days, this rate improved during the following year. From September 1978 through April 1979, 69.3 percent of second-level appeals were processed within 75 days. Plaintiffs' Motion for Summary Judgment, Exhibit F; Joint Motion to Recognize the Expiration of the Amended Stipulation.

[8] The Secretary does not contend that this case is moot because the named representatives of the *Wilkinson* class have by now all received their second-level decisions from the board of review. *See Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973). Although the record does not reveal whether or not this has occurred, termination of the class representatives' claims would not render this case moot. Some, if not all, of the named appellants who were certified as class representatives had a case or controversy at the time the complaint was filed and at the time the class action was certified by the district court. There remains in our view a continuing live controversy between the Federal defendants and clearly identifiable class members, *i.e.*, those individuals who, notwithstanding the commonwealth defendants' improved performance, *see* n.8, *infra*, continue to wait over 60 days for board of review decisions. *See United States Parole Commission* v. *Geraghty*, 48 U.S.L.W. 4296, 4298-99 (1980); *Bell* v. *Wolfish*, 441 U.S. 520, 526 n.5 (1979); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 752-57

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles of rules of law which cannot affect the result as to the thing in issue in the case before it.

"The rule in Federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the action is filed." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10 (1974).

Mootness doctrine is, in part at least, a function of the article III requirement of a "case or controversy." *See, e.g., North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Powell* v. *McCormack*, 395 U.S. 486, 496 n. 7 (1969). This requirement "limit[s] the business of the Federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968). *See also United States Parole Commission* v. *Geraghty*, 48 U.S.L.W. 4296, 4398 (1980); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 754-55 (1976). Moreover, mootness doctrine may properly incorporate considerations of policy. *See Kremens* v. *Bartley*, 431 U.S. 119, 127-32 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. at 755-57 and n. 8. As the court stated in *Geraghty* v. *United States Parole Commission*, 579 F.2d 238, 246 (3d Cir. 1978), *vacated on other grounds*, 48 U.S.L.W. 4296 (1980), once the article III requirements have been satisfied, the court, in applying the mootness doctrine, "must answer the more policy-oriented question whether the parties before it have, at the time for decision, sufficient functional adversity to sharpen the issues for judicial resolution." *See Dow Chemical Co.* v. *E.P.A.*, 605 F.2d 673, 677-78 (3d Cir. 1979). In this case, neither article III nor policy considerations preclude our review at this time.

Although the Commonwealth defendants have eliminated administrative delays in the processing of second-level appeals to the extent reflected in the amended stipulation,[9] the Commonwealth defendants' compliance with the terms of the amended stipulation is voluntary. Thus the *Wilkinson* class has

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Footnote cont.

(1976); *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1973). In addition, because of the passage of time, it is probable that no single class member's appeal will remain undecided long enough to see the litigation to its conclusion; the issues here are thus, as in *Sosna* v. *Iowa*, 419 U.S. at 400-401, and *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n. 11 (1975), "capable of repetition, yet evading review." *See also, United States Parole Commission* v. *Geraghty*, 48 U.S.L. at 4299; *Bell* v. *Wolfish*, 441 U.S. at 526 n. 5. Finally, the identity of the *Wilkinson* class members' interests, as well as the tenacity and competence of the attorneys in representing these interests is unquestioned and has been evident throughout this litigation. *See Franks* v. *Bowman Transportation Co.*, 424 U.S. at 756; *Gerstein* v. *Pugh*, 420 U.S. at 110, n. 11. *Sosna* v. *Iowa*, 419 U.S. at 403; *Geraghty* v. *United States Parole Commission*, 579 F.2d 238, 248-49 (3d Cir. 1978), *vacated and remanded on other grounds*, 48 U.S.L.W. 4296 (1980). *Compare Kremens* v. *Bartley*, 431 U.S. 119 (1977).

[9] Indeed, it appears that the board of review has actually improved upon the time limits contained in the amended stipulation. The amended stipulation required that the board of review decide 65 percent of all second-level appeals within 75 days. When the amended stipulation expired, 69.3 percent of second-level appeals were being decided within 75 days. *See* n.6. At oral argument, counsel informed the court that in May 1979, 87 percent of second-level appeals were decided within 75 days, and that in December 1979, this rate had tapered slightly to 85 percent within 75 days.

yet to obtain the relief that it consistently has sought: The promulgation of regulations that would assure the timely disposition of all second-level appeals.[10] The Secretary's assertion that such regulations are not now necessary assumes away the purpose of this litigation. Since we cannot say with assurance that there is no likelihood that the Commonwealth defendants will revert to their dilatory behavior, any requirement that the Secretary promulgate such regulations as are sought by the *Wilkinson* class will have a real prospective effect on the processing of second-level appeals by the board of review. This prospective effect satisfies the article III "case or controversy" requirement. *See Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 514-16 (1911).

Even assuming that there is no reasonable likelihood of a recurrence of the delays in processing second-level appeals which prompted this litigation, this case still is not moot because the relief which the *Wilkinson* class obtained from the Commonwealth defendants pursuant to the amended stipulation is not entirely congruent with the relief which it seeks from the Secretary. *See Powell* v. *McCormack*, 395 U.S. at 495-500 (although primary relief sought no longer possible, collateral consequences of litigation prevent case from becoming moot); *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 202-203 (1968) (dissolution of defendant association did not render antitrust action moot where injunctive relief was also sought against association's members).

The *Wilkinson* class obtained from the Commonwealth defendants, under the terms of the amended stipulation initially and through voluntary compliance thereafter, an agreement to process second-level appeals at a designated rate. What the *Wilkinson* class seeks in its litigation with the Secretary is a construction of the Social Security Act or the Constitution which would require the Secretary to promulgate regulations imposing a precise timetable for the disposition of second-level appeals. Although such relief may well have the effect of compelling the Commonwealth defendants to behave as they have under the amended stipulation, it would have other effects as well. If the Secretary's current regulation was invalidated on statutory or constitutional grounds and the Secretary were directed to promulgate new regulations along the lines of those sought by the *Wilkinson* class, it may well be that the Secretary would promulgate regulations having an effect on the board of review different than that of the amended stipulation. For example, the Secretary could promulgate regulations establishing a more stringent timetable than the amended stipulation, or he could establish regulations that would provide an ongoing incentive for Pennsylvania to restructure its board of review's procedures or improve the board of review's disposition rate over time. Moreover, the required promulgation of regulations of the type sought by the *Wilkinson* class may well have the effect of creating new legal rights in applicants for unemployment compensation benefits.[11] While the amended stipulation between the *Wilkinson* class and the Commonwealth defendants created no rights, duties, or liabilities with respect to the Secretary, regulations promulgated by the Secretary are more likely to be construed as having such an effect. We, of course, decide none of these issues at this time; we merely point out that the relief sought against the Secretary is distinguishable from that obtained from the Commonwealth defendants pursuant to the amended stipulation. As a consequence, this case continues as a live controversy. We therefore turn to the merits of this appeal.[12]

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[10] We have not been informed that any legislative changes have been made in the structure or procedures of Pennsylvania's system of administrative review designed to assure the continued prompt disposition of second-level appeals. *Compare Fusari* v. *Steinberg*, 419 U.S. 379 (1975) (change in underlying State statute) [PR-350-7, BSSUI] Like the law, then, the temporal disposition of the board of review may be subject to "ebb and flow." *See* B. Cardozo, *Selected Writings of Benjamin Nathan Cardozo* 369 (1947).

[11] *See generally* Note, Violations by Agencies of their own Regulations, 87 Harv. L. Rev. 629 (1974).

III

The *Wilkinson* class challenges on statutory grounds the validity of the Secretary's current regulation which requires that second-level appeals be decided "with the greatest promptness that is administratively feasible." 20 C.F.R. section 650.3(a)(1)-(2). According to their argument, the Secretary's regulation is "not reasonably related to the mandate of the 'when due' clause of 42 U.S.C. section 503(a)(1)," and the Secretary's failure "to issue percentage criteria for second-level appeals frustrates the purpose of the statute." Brief for appellants at 13. We understand this general argument to consist of three interrelated contentions. First, the current regulation is not permissible under the statutory authority conferred upon the Secretary. Second, the current regulation fails to satisfy the basic administrative rationality requirement; it is, in the familiar words of the Administrative Procedure Act, "arbitrary," "capricious," and "an abuse of discretion." Third, the Secretary is required by section 303(a)(1) of the act, 42 U.S.C. section 503(a)(1), to promulgate regulations setting forth specific percentage timeliness criteria for second-level appeals. After discussing the standard of review of the Secretary's regulations applicable in this case, we will address these three contentions *seriatim*.

A. We must review the Secretary's current regulation to determine whether it is "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), *quoting Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-81 (1969). We also are to be guided by the judicial review provisions of the Administrative Procedure Act (APA). *See* 5 U.S.C. & 706.[13] There is no conflict, however, between these standards and the scope of review described in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. at 369, since regulations not reasonably related to the purposes of the enabling legislation would not survive scrutiny under the APA.

With respect to judicial review of agency rulemaking, section 10(e) of the APA provides in pertinent part that:

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[12] The Secretary does not argue that the Commonwealth defendants' compliance with the amended stipulation has so altered the status of the *Wilkinson* class as to render their dispute unfocussed, thereby precluding our review on policy considerations. *See Kremens* v. *Bartley*, 431 U.S. 119 (1977). The amended stipulation has not altered the identity of the *Wilkinson* class nor the continued interest of class members in obtaining speedy dispositions of second-level appeals.

[13] Courts reviewing the regulations of other agencies promulgated pursuant to the same statutory authority under which the Secretary acted in this case, 42 U.S.C. section 1302, have either applied the APA standards of judicial review set forth in 5 U.S.C. section 706 in conjunction with the "reasonably related" test, *see, e.g.*, *State of Florida* v. *Mathews*, 526 F.2d 319 (5th Cir. 1976), or have applied this latter test alone. *See, e.g.*, *National Welfare Rights Organization* v. *Mathews*, 533 F.2d 637 (D.C. Cir. 1976); *Johnson's Professional Nursing Home* v. *Weinberger*, 490 F.2d 841 (5th Cir. 1974).

> The reviewing court shall—
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> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
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> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .

5 U.S.C. section 706.

In applying these review standards, the Secretary's construction of section 303 of the act, 42 U.S.C. section 503, as reflected in his regulations, is entitled to presumptive validity. Unless "the clear meaning of a statute, as revealed by its language, purpose and history," *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n. 20 (1979), otherwise constrains us, we must show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

B. The *Wilkinson* class challenges the regulation promulgated by the Secretary as being "short of statutory right." 5 U.S.C. section 706(2)(C). It posits, correctly, that under 42 U.S.C. section 503(a)(1), administrative appellate review of denials of eligibility for unemployment compensation must be "reasonably calculated to ensure full payment when due." It then contends that the Secretary's regulation, requiring decisions with "the greatest promptness that is administratively feasible," 20 C.F.R. section 650.3(a), is not "reasonably calculated." Our evaluation of whether the Secretary, in promulgating this regulation, acted consistently with his statutory authority "begins with a delineation of the scope of the Secretary's authority and discretion." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16 (1971).

The statutory authority for promulgating the regulations at issue here is quite broad. The act imposes a duty on the Secretary to monitor regularly the administrative review procedures provided by State unemployment compensation programs. Annual Federal funding is to be approved only for those programs which, in the Secretary's judgment, have procedures "reasonably calculated to ensure full payment of unemployment compensation when due" and provide unsuccessful claimants with an "opportunity for a fair hearing, before an impartial tribunal." 42 U.S.C. section 503(a)(1)(3). At the same time, the Secretary is given a great deal of flexibility in determining whether a State's program satisfies the statutory prerequisites to funding, since he need only satisfy himself that a program "complies substantially" with these prerequisites. *Id.* section 503(b)(2). To enable him to carry out this duty, the Social Security Act provides that the Secretary "shall make and publish such rules and regulations, not inconsistent with [the act], as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the act]." 42 U.S.C. section 1302. Thus, in carrying out the mandates of the act, the Secretary is vested with plenary rulemaking authority. *See Serritella* v. *Engleman*, 339 F. Supp. 738, 752 (D. N.J.), *aff'd per curiam*, 462 F.2d 601 (3d Cir. 1972).

In exercising his broad authority, the Secretary must be cognizant that "[t]he basic thrust of the statutory 'when due' requirement is timeliness." *Fusari* v. *Steinberg*, 419 U.S. 379, 387-88 (1975) [PR-350-7, BSSUI], citing

California Human Resources Dept. v. *Java*, 402 U.S. 121, 130-33 (1971) [PR-350-89, BSSUI]. In *Java*, the Supreme Court described the intent of Congress in enacting this legislation as follows:

> The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee. Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible this must be regarded as what Congress was trying to accomplish.

402 U.S. at 130. Construing the intended meaning of the "when due" clause to be full payment "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard," *id.* at 131, the court held that California's unemployment compensation program could not consistently withhold payment of unemployment compensation from a claimant with the "when due" requirement pending an employer's appeal from an initial determination of eligibility. The court identified several reasons underlying the requirements of rapid payment: (1) "to give prompt if only partial replacement of wages to the unemployment, to enable workers to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief," *id.* at 131 (footnote omitted); (2) to provide "a means of assisting a worker to find substantially equivalent employment," *id.* at 132; and (3) to provide a means of exerting an influence upon the stabilization of industry by preventing a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services." *Id.* In *Fusari* v. *Steinberg*, 419 U.S. at 388-89 and n. 15, the court, to achieve these statutory purposes, suggested that the rationale of *Java* should extend to require prompt disposition of claims submitted for determination to the administrative process. The requirement of timeliness is applicable to all phases of the administrative process. Not only to the time within which claimants determined to be eligible are paid, but also to the rapidity with which appeals of ineligibility determinations are decided, lest claimants who ultimately win their appeals suffer long delays in obtaining payment. *See Ross* v. *Horn*, 598 F.2d 1312, 1321 (3d Cir. 1979),[14] petition for *cert*, filed, 48 U.S.L.W. 3225 (1979).

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[14] We find no merit in the Secretary's argument that the "when due" requirement of section 303(a)(1) of the act, 42 U.S.C. section 503(a)(6) does not apply until a claimant has first been administratively determined to be eligible for unemployment compensation benefits. The Supreme Court in *Fusari* v. *Steinberg*, 419 U.S. 379, 388-89, n.15 (1975) [PR-350-7, BSSUI], made clear that it would not endorse such a restrictive interpretation of the statute. Plaintiffs in *Fusari* had challenged the legality of Connecticut's unemployment compensation procedures for determining continued eligibility for benefits, asserting that the suspension of benefits without an adequate prior hearing violated the "when due" requirement of section 303(a)(1). The district court expressed serious reservations whether Connecticut's system satisfied this requirement, stating that: "[I]f the purpose of unemployment compensation really is 'salary replacement' and providing benefits to the worker as close to the date of unemployment as possible, it would seem that a system that makes large numbers of those with valid claims wait on the average of over 100 days before allowing them benefits conflicts seriously with the statutory objectives." 364 F. Supp. 922, 937 (D. Conn. 1973) (citation omitted). However, the district court felt foreclosed from finding a statutory violation, believing itself bound by the Supreme Court's summary affirmance in Torres v. *New York State Dept. of Labor*, 405 U.S. 949 (1972), of a three-judge court decision upholding the validity of New York's system of terminating unemployment compensation benefits without a prior hearing against a similar section 303(a)(1) attack. In reaching its conclusion, the three-judge court interpreted section 303(a)(1) to mean that once an administrative determination of ineligibility was rendered, payments were no longer "due." The Supreme Court in *Fusari* explained that the district court had misunderstood the significance of the summary affirmance in *Torres*:

Since the Secretary is obligated to approve Federal funding only for State programs with procedures "reasonably calculated to ensure full payment of unemployment compensation when due," we must measure the Secretary's regulation against this statutory mandate. The challenged regulation requires the disposition of appeals with the "greatest promptness that is administratively feasible." Because the statutory phrase "when due" is textually open ended, it is somewhat difficult to measure against the Secretary's standard of administrative feasibility. We are satisfied, however, that the standard chosen by the Secretary is consistent with the right created by the statute. In *Java*, the Supreme Court stated that " 'when due' was intended to mean at the earliest stage of employment that [unemployment compensation] payments were *administratively feasible* . . . ." 402 U.S. at 131 (emphasis added). The Supreme Court's construction of the statute is thus reflected directly in the language of the Secretary's regulation. The purpose of the statute is to assure Federal funding only for State unemployment compensation programs in which benefit claims receive prompt and accurate disposition. These statutory goals of promptness and accuracy find support in the Secretary's standard of administrative feasibility; imposing standards for administrative performance that are not feasible would jeopardize both of these goals. Because the Secretary's regulation tracks the Supreme Court's construction of the statute and is itself consistent with the purposes of the statute, we hold that it is not short of statutory right and that the Secretary did not deviate from his statutory mandate.

C. In addition to arguing that the Secretary has failed to discharge his statutory mandate, the *Wilkinson* class contends that the Secretary has acted in a manner which is arbitrary, capricious, and an abuse of discretion in promulgating the current regulation. Specifically, appellants argue that the Secretary cannot rationally distinguish between first- and second-level appeals; that in light of the specific percentage promptness criteria for first-level appeals, the failure to promulgate similar regulations with respect to second-level appeals is an abuse of discretion.

The applicable standard of review was described by the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), as follows:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was

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Footnote cont.

The District Court interpreted our summary affirmance in *Torres* to indicate that benefits are not "due" under §303 until administratively deemed payable. While this is a plausible reading of the evolution and affirmance of *Torres*, it is not one that we can endorse. Such a definition of the "when due" requirement of federal law would leave little vitality to *Java* and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits.

(Citations omitted.) The Secretary here seeks to skirt the *Fusari* court's explanation of the *Torres* summary affirmance by distinguishing both *Torres* and *Fusari* on the basis that in those cases the claimant had at least received an initial administrative determination of eligibility for unemployment compensation benefits. The Secretary argues that where a claimant has never been determined eligible, the "when due" requirement is inapplicable. But this conclusion would no less nullify the "vitality" of *Java* than the conclusion of the *Fusari* district court. The congressional intent of requiring prompt payment "when due" applies as much to a claimant who is determined eligible on appeal from an initial determination as one who was found eligible at the initial stage. The critical factor is *timely* payment to *all* eligible persons, whether their eligibility is upheld initially or only after one or more appeals.

> based on a consideration of the relevant factors and whether there has been a clear error of judgment [citations omitted]. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Under this scope of review, "there will be occasions when 'we must affirm decisions with which we disagree' as long as they are rational and reflect a full consideration of relevant factors." *National Industrial Sand Association* v. *Marshall*, 601 F.2d 689, 699 (3d Cir. 1979), *quoting Ethyl Corp.* v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976). (Footnote omitted.)

The Secretary has asserted several justifications for promulgating only a general regulation concerning second-level appeals. First, the decision to provide second-level appeals is discretionary with each State. The Secretary wishes to encourage States to provide second-level administrative appeals since this procedure provides a relatively low-cost means for a claimant to challenge an adverse benefit determination after an initial full hearing on the merits of his claim. According to the Secretary, this goal might be jeopardized by regulations governing second-level appeals which establish any standard more stringent than that of administrative feasibility. Any State that feels burdened by such stringent regulations could simply do away with second-level appeals. The *Wilkinson* class, not surprisingly, disputes the likelihood of such a response on the part of States with second-level appeals.

Second, the Secretary states that the variety of second level administrative appeal procedures that exist among states would make it difficult to establish regulations with specific percentage criteria for second-level appeals.[15] While the *Wilkinson* class's counterpoint — that the Secretary has overcome such difficulties with respect to first-level appeals — is not without substance, this riposte is not sufficient to render the Secretary's position arbitrary or capricious. The issue here is not whether the Secretary could better draft his regulations, but whether his regulations have a rational basis.

Finally, the Secretary asserts that the practical difference between the current general regulation governing second-level appeals and the specific percentage regulation sought by the *Wilkinson* class is negligible. Discontinuation of Federal funding to a State program would disadvantage the State certainly, but it would also adversely affect those unemployed persons seeking unemployment compensation benefits. For this reason, the regulations provide that even when a State has failed to comply substantially with the requirements of the statute, the Department of Labor will, before withholding funding, make "every reasonable effort" to "resolve the question involved." 20 C.F.R. section 601.5(a)-(b). Since the regulations are therefore in practice applied more as guidelines than as mandatory standards, it is not unreasonable, according to the Secretary, to frame the regulation at issue in terms of a general precatory standard.

In addition to the foregoing justification for his current regulation, the Secretary also contends that it is reasonable to distinguish between first- and second-level appeals, establishing specific percentage criteria for the former but not the latter. First-level appeals, in Pennsylvania at least, provide the first opportunity for a full hearing on the disputed benefit claim. It is important that such hearings be provided promptly and that claims be disposed of expeditiously. Moreover, relatively precise regulations are a useful means of guiding administrative discretion at the initial and least formal administrative stages. Since claimants appealing to the second-level of administrative review will generally have been previously afforded a full administrative hearing of their claims within specified time limits, the Secretary explains that it is sufficient to require the processing of second-level appeals with the promptness that is administratively feasible.

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[15] **We are advised that some States provide merely for a review of the record on the second administrative appeal, while others, as in Pennsylvania, allow additional evidence and/or oral argument. In addition, Ohio provides for a summary rejection of the appeal without stated reasons. Affidavit of Robert B. Edwards, February 6, 1979, section 9, 12.**

After reviewing the justifications provided by the Secretary for his current regulation and the distinction between first- and second-level appeals, we conclude that the Secretary's regulation is rationally based. The threat of creating a disincentive to the continued maintenance of second-level administrative review procedures appears to us to be real. Also, the difficulties in promulgating specific second-level appeal regulations because of the differences in administrative procedures among States seem plausible. Finally, since second-level appeals take place after the claimant has been provided a full hearing, first-level and second-level appeals can rationally be distinguished, and the Secretary may within his discretion apply different promptness criteria for each level as he has done here.[16]

D. We pause briefly to address the argument of the *Wilkinson* class that the statute requires the Secretary to promulgate regulations setting forth specific timeliness criteria for second-level appeals. By deciding that the Secretary's current regulation is within his statutory authority and rationally based, we have implicitly rejected the argument that the Secretary must promulgate such specific timeliness regulations. We note, in addition, that nothing in the text of the statute or the legislative history supports the imposition of such a duty on the Secretary. In fact, the argument of *Wilkinson* class runs contrary to the general rule that the Secretary is accorded broad discretion in promulgating regulations. We expressly reject this argument.[17]

IV

The *Wilkinson* class challenges the Secretary's regulation on fifth amendment due process grounds. They contend that the current regulation fosters unreasonable delays in the determination of second-level appeals and that these delays result in a constitutional deprivation. No attack is made on the Secretary's regulation insofar as it affects the procedures provided by States in the administration of the unemployment compensation programs; the attack is based only on the delays that ensue in the operation of these state administrative procedures.

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[16] The *Wilkinson* class also argues that the Secretary's regulation governing second-level appeals is invalid because it is so vague as to provide neither an incentive for States to process their second-level appeals in a prompt fashion nor any meaningful basis for the Secretary to carry out his statutory monitoring duty. We disagree. The standard of administrative feasibility is an intelligible one, and puts the states receiving Federal funding on notice that slothfulness in the review process will not be tolerated. This standard also has the advantage of enabling the Secretary to monitor State programs on an individualized basis.

[17] In assessing the statutory validity of the Secretary's regulation, we have considered the effect of this regulation on the rate of processing of second-level appeals by the Pennsylvania board of review both prior to and after the date of the amended stipulation. The standard set forth in the Secretary's regulation is administrative feasibility. Certainly the improved rate of processing achieved under the amended stipulation has established a benchmark for applying this standard. If the board of review were to regress significantly without justification from the rate of processing achieved during the life of the amended stipulation, this would most likely violate the Secretary's administrative feasibility standard. Enforcement of the regulation would then be sought in court. We need not decide at this time whether prolonged period of unreasonable delay in the processing of second-level appeals might call into question the utility of the administrative feasibility standard itself. *See Blankenship* v. *Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978); *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978); *Barnett* v. *Califano*, 580 F.2d 28 (2d Cir. 1978); *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). *But see Wright* v. *Califano*, 587 F.2d 345 (7th Cir. 1978).

In evaluating the due process claim raised by the *Wilkinson* class, we must first determine whether the interest asserted is within the fifth amendment's protection of "property." *See Smith* v. *Organization of Foster Families* 431 U.S. 81b, 383-39 (1977). Property interests in benefits protected by due process were described by the Supreme Court in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . . Property interests of course are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Once it is determined that a constitutionally protected property interest is implicated by official action, the remaining question is to determine what process is due. This determination is not a mechanical one, for "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Three factors are generally considered in delineating the process that is constitutionally due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. *Eldridge*, 424 U.S. 319, 335 (1976). (Citation omitted.)

State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process. *See Ross* v. *Horn*, 598 F.2d 1312, 1317-18 (3d Cir. 1979), petition for *cert*. filed, 48 U.S.L.W. 3225 (1979).[18] No challenge has been raised to the Secretary's regulation insofar as it affects the type or adequacy of procedures that Pennsylvania has provided for raising and disposing of second-level appeals. The due process challenge is founded on the contention that the Secretary's regulation has condoned or fostered unreasonable delays in the implementation of Pennsylvania's administrative procedures concerning second-level appeals.[19] Temporal due process is at issue.

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[18] Our conclusion that claimants for State unemployment compensation benefits have a protected property interest applies no less to claimants, like the *Wilkinson* class, seeking to establish eligibility in the first instance, than to claimants as in *Ross* v. *Horn*, 598 F.2d 1312 (3d Cir. 1979), petition for *cert*. filed, 48 U.S.L.W. 3225 (1979), seeking to establish continued eligibility. The *Wilkinson* class members claim an entitlement to benefits that is grounded in the statute defining their eligibility. Although they have not shown that they are, in fact, within the statutory terms of eligibility, the Supreme Court has made clear that due process protection extends to claimants seeking to establish their entitlement to the statutory benefits. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). *Accord, Wright* v. *Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (court reviewing due process challenge by unsuccessful applicants for old age and survivors benefits under the Social Security Act stated that "denials do not necessarily deserve less due process than terminations"). *Steinberg* v. *Fusari*, 364 F. Supp. 922, 935 (D. Conn. 1973), *vacated on other grounds*, 419 U.S. 379 (1975) *rehearing denied*, 420 U.S. 955 (1975) ("It makes little difference . . . that those who fail the 'seated interview' test are not entitled to [unemployment compensation] benefits . . . [t]hat entitlement is precisely what is at issue . . . ").

The factors set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), must be evaluated with the understanding that the fundamental requirement of procedural due process is an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Adequate procedures alone are not sufficient; delay in administrative review of eligibility for State unemployment compensation benefits is a significant factor in assessing the sufficiency of the process provided.[20] *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975) [PR-350-7, BSSUI]. *See also Barry* v. *Barchi*, ____ U.S. ____, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979); *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587, 591 (1926); *Shands* v *Tull*, 602 F.2d 1156, 1159 (3d Cir. 1979); *Wright* v. *Califano*, 587 F.2d 345, 354 (7th Cir. 1978). Unreasonable delays in rendering decisions from appeals of denials of social security benefits may well give rise to a due process violation. *See, e.g.*, *Steinberg* v. *Fusari*, 364 F. Supp. 922 (D. Conn. 1973), *vacated on other grounds*, 419 U.S. 379, *rehearing denied*, 420 U.S. 955 (1975) [above]; *White* v. *Mathews*, 434 F. Supp. 1252 (D. Conn. 1976), *aff'd* 559 F.2d 852 (2d Cir. 1977) *cert. denied*, 435 U.S. 908 (1978). However, in assessing "when due process is no longer due process because past due, the influence of other significant factors is not to be ignored." *Wright* v. *Califano*, 587 F.2d at 354.

We cannot minimize the significance of the private interest at stake in claims for unemployment compensation. The importance of unemployment compensation benefits has been recognized by the Department of Labor:

> . . . [U]nemployment insurance is designed to prevent the destitution [occasioned by unemployment] by immediately providing a cash payment to meet the worker's non-deferrable expenses. In this light, there is at least as urgent a need for the prompt processing of unemployment benefits appeals as for those under the Public Assistance Programs.

Promptness Report, Plaintiffs' Motion for Summary Judgment, Exhibit A, p. 12.[21] Since the employed worker generally maintains a household budget premised on the receipt of wage income, sudden unemployment would have a severe effect on this budget. Unemployment compensation payments are designed to smooth the transition between periods of unemployment by mitigating to a degree the erosion of the household budget caused by temporary unemployment. The congressional decision to provide Federal funding for State unemployment compensation programs suggests the importance of this type of social insurance. *See California Human Resources Dept.* v. *Java*, 402 U.S. at 130 [PR-350-89, BSSUI].

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[19] The *Wilkinson* class attempts to demonstrate the constitutional infirmity of the Secretary's regulation concerning second-level appeals by showing its effect on the administrative process in States other than Pennsylvania. We do not think that the *Wilkinson* class can adequately represent the interests of claimants for unemployment compensation benefits in States other than Pennsylvania, *see* Fed. R. Civ. Proc. 23(a); *Scott* v. *University of Delaware*, 601 F.2d 76 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 275 (1979), and we do not consider their challenge to the Secretary's regulation other than as it affects the administrative procedures in Pennsylvania.

[20] In *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975) the Supreme Court stated that:

> Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected by official action . . . . The formality and procedural requisites for a due process hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. In this context, the possible length of wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests. Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process, (Citations omitted.)

[21] As a constitutional matter, unemployment insurance is not on the same level with public assistance benefits. *Compare Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (pretermination hearing required for public assistance benefits) *with Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (post-termination hearing permissible for Social Security disability benefits). In *Ross* v. *Horn*, 598 F.2d 1312, 1318-19 (3d Cir. 1979) petition for *cert.* filed, 48 U.S.L.W. 3225 (1979), this court upheld the constitutional adequacy of procedures for terminating unemployment compensation benefits in cases of suspected unemployment fraud. We analogized the individual's interest

Although the importance to unemployed workers of unemployment compensation benefits cannot be denied, we are required on this appeal only to evaluate the significance of prompt disposition of second-level appeals. This interest is of lesser significance than the initial determination of eligibility following an evidentiary hearing. In Pennsylvania, the elemental requirements of due process—notice and an opportunity to be heard—are satisfied during the first-level appeal proceeding. First-level appeals are the subject of regulations in which the Secretary has established specific percentage timeliness criteria and neither these regulations nor Pennsylvania's compliance with them is challenged on this appeal. Although the *Wilkinson* class undoubtedly has an interest in avoiding any administrative delay, this interest is attenuated during the second-level appeal procedure because the prior denial of benefits has been based on a full hearing presumably provided within the time limits of the Secretary's first-level appeals regulations.[22]

We cannot conclude that the risk of erroneous deprivation of unemployment compensation benefits is unnecessarily high in Pennsylvania as a consequence of the regulation promulgated by the Secretary. The erroneous deprivation would presumably occur during the period of alleged unreasonable delay in the decision of a second-level appeal which would reverse earlier administrative decisions and uphold a claim for unemployment benefits. But prior to filing a second-level appeal in this case, each member of the *Wilkinson* class would already have received two determinations of ineligibility—an initial denial of eligibility and an affirmance of this denial by a referee of the board of review.[23] During the referee review stage,

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Footnote cont.

in continued receipt of unemployment compensation benefits to the interest in disability benefits described in *Mathews* v. *Eldridge*, *supra*, especially since unemployment compensation benefits are not necessarily need-based.

[22] Because the private interest implicated in this case concerns only the delay involved in the processing of second-level appeals, this case is not analogous to those decisions cited by the *Wilkinson* class which have found due process violations as the result of unreasonable administrative delays in the processing of first-level administrative appeals. *See, e.g.*, *White* v. *Mathews*, 434 F. Supp. 1252 (D. Conn. 1976), *aff'd* 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Steinberg* v. *Fusari* 364 F. Supp. 922 (D. Conn. 1973), *vacated on other grounds*, 419 U.S. 379 (1975), *rehearing denied*, 420 U.S. 955 (1975). First-level appeals involve the crucial point at which claimants for unemployment compensation benefits are afforded an evidentiary hearing on their claims. The private interest in this initial procedure is at its apogee. This fact, taken in conjunction with other due process considerations, may well lead to the conclusion that unreasonable delays at this level violate due process.

[23] Although we do not have a complete summary of the statistics concerning overall reversal rates, *i.e.*, the number of reversals after hearing in relation to all denials of benefits, *see Mathews* v. *Eldridge*, 424 U.S. 319, 346 and n.29 (1976); *Mattern* v. *Mathews*, 582 F.2d 248, 256 n.11 (3d Cir. 1978), *cert. denied*, 99 S. Ct. 3101 (1979); *Fusari* v. *Steinberg*, 419 U.S. 379, 383 n.6 (1975) [see above], in Pennsylvania's unemployment compensation review process, the record reveals that appeals to the board of review have resulted in a reversal rate of only between 7.5 percent and 11.1 percent. Supp. App. Exhibit A, pp. 17-18; App. Exhibit I, p. 40.

claimants are afforded a hearing and are permitted to appear with counsel, to present evidence, and to confront and cross-examine adverse witnesses. Pa. Stat. Ann. tit. 43, section 822; 34 Pa. Code section 101.86; *Paoloco* v. *Commonwealth of Pa. Unemployment Compensation Board of Review*, 10 Pa. Comm. 214, 309 A.2d 594 (1973). The referee is required to provide a written decision setting forth findings of fact and conclusions of law. Pa. Stat. Ann. tit. 43, section 822; 34 Pa. Code sections 101.88, .89. This level of review is subject to the Secretary's regulations setting forth specific percentage promptness criteria.

The procedures provided during the first review level tend to minimize the likelihood that erroneous deprivations will occur because of unreasonable delays during the second-level of review. Moreover, it is not evident that the risk of erroneous deprivations would be reduced if the Secretary were to promulgate alternate regulations. Under the current regulations, second-level appeals must be disposed of with the promptness that is administratively feasible. If regulations were promulgated setting forth specific promptness criteria for second-level appeals, and these criteria were not administratively feasible, the likelihood of erroneous decision would increase. Errors would multiply as the State administrative system strained to comply with inflexible standards. Alternatively, as the Secretary has suggested, States may simply decide not to provide second-level appeals if the Federal standards with which they must comply are unduly burdensome. Abolition of second-level appeals also would increase the risk of erroneous deprivations.

Moreover, the administrative feasibility standard set forth in the current regulations is not a toothless one. The rate of processing of second-level appeals by the Pennsylvania Board of Review under the terms of the amended stipulation for dismissal provides a clear benchmark as to the rate that is administratively feasible. We are not required at this time to determine whether the rate of processing of second-level appeals in the years prior to the amended stipulation for dismissal violated the due process clause or the Social Security Act or the Secretary's regulations. It is sufficient to state that

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Footnote cont.

This statistic is relevant because our primary concern is with the risk of erroneous deprivation to individuals taking appeals to the board of review rather than with the overall fairness of the entire procedural system. *See White* v. *Mathews*, 559 F.2d 852, 858 n.7 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). This reversal rate is relatively low and reflects the substantial procedural protections that are afforded at the first-level of appeal. This is especially true in view of the fact that the reversal rate would presumably be even lower if the number of reversals were expressed as a percentage of all denials of benefits rather than of only those denials appealed to the board of review, and in view of the additional fact that those reversals at the second level which were based on newly introduced evidence would not necessarily be indicative of a prior erroneous determination. *See Wright* v. *Califano*, 587 F. 2d 345, 351 N. 7 (7th Cir. 1978). *Compare Mathews* v. *Eldridge*, 424 U.S. at 346 and n.29 (58.6 percent reversal rate of appealed reconsiderations and 3.3 percent overall reversal rate was relevant to a determination of the reliability of existing pretermination procedures, though not controlling); *White* v. *Mathews*, 434 F. Supp. 1252, 1261 (D. Conn. 1976), *aff'd* 559 F.2d 852, 858 (2d cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (over 50 percent reversal rate of denials appealed to first level of administrative review was relevant to district court's determination that delays averaging 7 months in the administrative review process was violative of due process, and was relevant to second circuit's affirmance on statutory ground); *Wright* v. *Califano*, 587 F.2d 345 (7th Cir. 1978) (though facts and issues were similar to those in *White* v. *Mathews*, *supra*, no due process violation found); *Steinberg* v. *Fusari*, 364 F. Supp. 922, 936–37 at n.28 (D. Conn.) *vacated on other grounds*, 419 U.S. 379, *rehearing denied*, 420 U.S. 955 (1975) (reversal rate ranging from 19.4 percent to 26 percent of first-level appeals of terminations of unemployment compensation benefits was relevant to determination that failure to provide pretermination hearings violated due process).

the rate that has been achieved under the amended stipulation is not an unreasonable one.[24] In light of this benchmark, if Pennsylvania's board of review were to regress without justification to its prior rate of decision of second-level appeals, a violation of the Secretary's administrative feasibility regulation may result.

The interest of the Federal Government that would be implicated if the Secretary were required to revise his regulation governing second-level appeals does not appear to be insignificant. The administrative or financial burdens imposed on the Federal Government would result from the development and implementation of promptness standards applicable in Pennsylvania and, presumably, throughout the country. The Secretary has stated that the promulgation and implementation of a new regulation could be difficult because of the varied manner in which second-level appeals are processed in the different States. Furthermore, in Pennsylvania at least, the administration of the board of review is funded entirely by the Federal Government through the Department of Labor. Thus, any additional funds required to achieve compliance with a revised regulation would have to come from the Federal Government. We cannot say that these administrative and financial burdens would be insubstantial.[25]

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[24] In *Steinberg* v. *Fusari*, 364 F. Supp. 922, 934, 936 (D. Conn. 1973), *vacated on other grounds*, 419 U.S. 379, *rehearing denied*, 420 U.S. 955 (1975), the district court found that Connecticut's unemployment compensation system violated due process in part because delays at first level appeals resulted in about 89.9 percent of all decisions taking over 100 days. Not only are the figures in this case substantially better than in Connecticut, but we are dealing with second-level appeals. In Pennsylvania, first-level appeals are decided with even greater promptness than second-level appeals.

Because of the various ways in which statistics regarding delays in administrative appeals processes have been presented to courts confronted with constitutional challenges to these processes, it is difficult to make any meaningful comparison between the facts of these cases. For example, the district court in *Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432, 439 (S.D. N.Y.), *vacated and remanded for further consideration*, 402 U.S. 968, *reaff'd on remand*, 333 F. Supp. 341 (1971) *aff'd mem.*, 405 U.S. 949 (1972), found that New York State's unemployment compensation program was not violative of due process, noting that first level appeals were decided in an average of 45 days. In *White* v. *Mathews* 434 F. Supp. 1252, 1261 (D. Conn. 1976), *aff'd*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), however, the district court concluded that an average delay in Connecticut of 211.8 days in the rendering by an administrative law judge of decisions regarding disability benefit claims was violative of due process. The second circuit affirmed the district court's decision on statutory grounds. In the present case, the record does not reveal the average time for decision of second level appeals.

We recognize that significant hardships may result to those individuals whose benefits have been erroneously denied and who must wait more than 60 days for a reversal by the board of review of their initial ineligibility determinations. However, on this appeal, we are not called upon to address the issue of whether individual cases involving unreasonable delays in processing second level appeals might give rise to a due process violation. We are concerned, rather, with the overall adequacy of the procedures provided. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976).

[25] Since there is a limited Federal budget for all social welfare programs, more stringent requirements applicable to second-level appeals may well have the effect of shifting funds used for the administration and processing of first level appeals.

> At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

Mathews v. *Eldridge*, 424 U.S. 319, 348 (1976) (citation omitted).

Our consideration of the due process factors set forth in *Mathews* v. *Eldridge*, 424 U.S. at 335, leads us to conclude that the Secretary's current regulation, insofar as it affects the rate of disposition of second-level appeals in Pennsylvania, does not violate due process. The private interest in the prompt disposition of second-level appeals is significantly weaker than the interest in a prompt initial hearing. The procedures afforded during the first appeal level minimize the risks of erroneous deprivations at the second level, and we are not convinced on the basis of the present record that alternative second-level regulations would further reduce those risks. Finally, the administrative and economic burden on the Federal Government of promulgating and implementing an alternative regulation of the sort sought by the *Wilkinson* class would not be insubstantial. Taken together, these factors establish the constitutional validity of the current regulation.

V

In conclusion, we hold that this appeal is not moot. The Secretary's regulation governing second-level appeals is rational, consistent with the Social Security Act, and valid under the due process clause. The order of the district court will therefore be affirmed.

JOHN F. GERRY U.S.D.J.
Concurred:
ALDISERT AND GIBBONS, U.S.C.J.

Florida

U.S. DISTRICT COURT
NORTHERN DISTRICT
TALLAHASSEE DIVISION

September 22, 1978

JAMES NEAL, *et al* v. PHILIP ASHLER, *et al.*

Payment of benefits when due

Procedure 350, 195

Plaintiffs, who were unemployed and had second-level unemployment compensation appeals pending before the state board of review, filed a class action suit for injunctive relief leading to prompt processing of such appeals. They alleged that failure to pay benefits when due violated their fair hearing and due process rights under U.S. and State laws, specifically requesting adjudication of at least 80 percent of all intrastate second-level appeals within 60 days of filing. *Held*, preliminary injunction granted since there was likelihood of success on the merits, and that they would suffer irreparable harm if the motion was not granted; such harm outweighed any possible injunctive injury, and its grant served the public interest.

This action came before the court on September 8, 1978, for a hearing on all pending motions. After hearing the argument of counsel, the court at that time orally announced its ruling on all motions except plaintiffs' motion for preliminary injunction. Those rulings are reflected below. In addition, the court now holds that a preliminary injunction is appropriate under the circumstances of this case.

According to the complaint and various affidavits, the plaintiffs at the time this lawsuit was filed were unemployed and had second-level unemployment compensation appeals pending before the Florida Unemployment Compensation board of review.[1] Defendant Ashler is the Secretary of Commerce of the State of Florida. Defendant McMullian holds the position of Executive Director of the Division of Employment Security of the State of Florida. The remaining defendants are the incumbent members of the board of review.

Plaintiffs complain of an alleged failure by the defendants to promptly process intrastate second-level unemployment compensation appeals filed with the board. This failure, it is asserted, violated plaintiffs' rights, and the rights of all persons similarly situated, under section 303(a)(1) of Title III of the Social Security Act, 42 U.S.C. section 503(a)(1), the due process clause of the Fourteenth Amendment, and State law requiring prompt decisions of unemployment compensation appeals, Florida Statutes section 443.07; Fla. Admin. Code Ch. 8J-2.09. Plaintiffs demand preliminary and permanent injunctive relief requiring defendants to decide at least 80 percent of all intrastate second-level unemployment compensation appeals within 60 days of filing.[2] A cause of action is asserted under 42 USC sections 501 et seq. and 1983; jurisdiction is founded upon 28 U.S.C. section 1343(3) & (4).

In the Fifth Circuit a plaintiff must satisfy four prerequisites before a preliminary injunction will issue. These are:

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[1] An amendment to the Florida Statutes changes the title of the board of review to the Unemployment Appeals Commission effective October 1, 1978.

[2] The relief sought here is identical to that obtained by a consent order in *Wilkinson* v. *Abrams*, E.D. Pa. Civil Action No. 76-1932 (Order of April 28, 1977), a copy of which this court has obtained. (Note: This is the preceding case.)

> (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the threatened harm and injunction may do the defendant, and (4) granting the preliminary injunction will not disserve the public interest.

Canal Authority of the State of Florida v. *Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *State of Texas* v. *Sea Train International*, S. A., 518 F.2d 175 (5th Cir. 1975); *Compact Van Equipment Co.* v. *Leggett Platt, Inc.* 566 F.2d 955 (5th Cir. 1978).

Likelihood of Success on the Merits

Plaintiffs have demonstrated that they have a substantial likelihood of success on the merits. Title III of the Social Security Act conditions receipt of Federal funding for the administration of State unemployment compensation programs in part upon a State's providing for prompt hearings to applicants whose claims are denied. The statutory language most pertinent to the present case reads:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State . . . includes provision for
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and
>
> . . .
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied . . . .

42 U.S.C. section 503(a)(1) & (3).

In *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971) [PR-350-89, BSSUI], the Supreme Court examined the congressional intent behind the section 503(a)(1) "when due" requirement. In the words of Chief Justice Burger:

> Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that *"when due" was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard.* The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief." Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for "security during the period following unemployment" was thought to be a means of assisting a worker to find substantially equivalent employment . . . Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry . . . Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.

401 U.S.C. 131-32 (emphasis added) (footnotes omitted).

The Supreme Court in *Java* concluded "that the word 'due'. . . , when construed in light of the purposes of the act, means the time when payments are first administratively allowed as a result of a hearing on which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment." 402 U.S. at 133. Consequently, the court held that "the California procedure, which suspends payments for a median period of 7 weeks pending appeal, after an initial determination of eligibility has been made" did not satisfy the "when due" requirement. *Id.*

Java made reference in passing to the California statutory requirement that second-level appeals to the appeals board must ordinarily be disposed of within 60 days of the filing of an appeal. This provision was not challenged in *Java*, and the court expressed no opinion as to its validity.

Following *Java*, the Department of Labor promulgated regulations establishing promptness standards to govern unemployment compensation appeals:

> This standard is responsive to the overriding concern of the United States Supreme Court in *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971), and that of other courts with delay in payment of unemployment compensation to eligible individuals, including delays caused specifically by the adjudication process. The standard seeks to assure that *all administrative appeals affecting benefit rights are heard and decided with the greatest promptness that is administratively feasible*.

29 C.F.R. section 650.1(a) (emphasis added). Although specific guidelines are set forth in the regulations only for first-level appeals, "the interpretation of Federal law requirements . . . applies to *both* first- and second-level administrative benefit appeals." 20 C.F.R. section 650.1(d) (emphasis added).

Under the Florida unemployment compensation program, the procedure for obtaining compensation payments is initiated by the filing of a claim at a Division of Employment Security office. An initial determination upon the claim is made by an examiner, and that determination "shall include a statement as to whether and in what amount claimant is entitled to benefits and, in the event of a denial, shall state the reasons therefor." Florida Statutes section 443.07(3)(a). An appeal of the initial determination is made to an appeals referee, who by statute is required to afford the parties reasonable opportunity for a fair hearing. The referee then renders findings and conclusions and affirms, modifies, or reverses the initial determination. Florida Statutes section 443.07(4)(b). A second-level appeal to the Unemployment Compensation Board of Review is available. The board may also elect to review a decision of an appeals referee on its own motion. The board is authorized upon review to affirm, modify, or reverse the findings and conclusions of the referee. Florida Statutes section 443.07(4)(c).

At the hearing it was uncontroverted that the board of review presently takes between 100 and 120 days to dispose of appeals. In 1975, however, according to the board's own notices to appellants, the average second-level appeal was disposed of within 60 days (Complaint, Exhibit A). Thus, it is obvious that it is "administratively feasible" for the board to decide most cases within a 60-day period, and that the board is not in compliance with the dictates of *Java* and section 503(a)(1). The fact that Florida is apparently in compliance with Federal guidelines requiring 75 percent of all *first-level* appeals to be disposed of within 45 days, 20 C.F.R. section 650.4(c), further demonstrates that it is feasible to complete 80 percent of *second-level* appeals within 60 days.

Defendants seek to justify the lengthy delay in deciding appeals by pointing to the economic recession of recent years, which caused a dramatic increase in the number of unemployed workers and a consequent increase in the number of unemployment compensation claims. This, it is said, resulted in the accumulation of an enormous backlog of claims. Defendants' statistics indicate that great improvements have been made in decreasing the time lag between filing and disposition of appeals, and defendants estimate that most appeals will be completed within a 60-day span prior to the end of this year. Defendants assert that further gains in the rate of processing of appeals at

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the present time would require the employment of additional personnel by the board of review, which, it is argued, can only be accomplished by additional Federal funding from the United States Department of Labor and approval by the Governor and Cabinet of Florida of an adjustment of the budget of the Florida Department of Commerce.

These objections are not sufficient to bar the preliminary relief sought by plaintiffs. The Second Circuit's discussion of similar claims in *White* v. *Mathews*, 559 F.2d 852 (2d Cir. 1977), is persuasive:

> As against this, the Secretary points to the serious problems with which the SSA had to cope. A flood of claims for benefits followed passage of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 901 *et seq.*, and Title XVI of the Social Security Act, 42 U.S.C. section 1381 et seq., which provided supplemental security income (SSI) for the aged. Legislative obstacles prevented efficient deployment of three distinct corps of hearing officers, who were separately handling Title II cases, black lung cases, and SSI cases, to dispose of the backlog involved here. And increasing the hearing staff was difficult because other civil hearing examiner petitions were paid more.
>
> Judge Clarie took note of these problems, and recognized that the SSA had, commendably, tried to overcome them. The SSA has increased support personnel and equipment, hired staff attorneys, and screened cases to identify candidates for favorable action without any need for a hearing. Nevertheless, Judge Clarie found that the SSA was not justified in forcing claimants to endure so many months of delay while they went without benefits.
>
> Like the district judge, we are sympathetic to the administrative problems that beset the SSA, but we do not believe that these difficulties establish that claimants in White's class have been given a "reasonable . . . opportunity for a hearing."

Id. at 859.

Irreparable Injury

Plaintiffs contend that where a Federal statute of Federal constitutional right has been violated, no showing of irreparable harm is necessary, citing *United States* v. *Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969), and other decisions. There is no necessity for the court to reach this claim, for irreparable injury is adequately demonstrated in the record.

The named plaintiffs appear typical of many newly unemployed workers who suddenly find themselves without a ready source of income to purchase needed items or to fend off the demands of their creditors. Citing statistics on unemployment compensation claimants, the district court in *Steinberg* v. *Fusari*, 364 F.Supp. 922 (D. Conn. 1973), *vacated*, 419 U.S. 379 (1975) [PR-350-7, BSSUI], noted that "the average claimant is often in dire straits." *Id.* at 936 n.26. Plaintiffs' individual affidavits bear out the reality of this economic deprivation. Besides the lack of income, the plaintiffs have suffered eviction or threats of eviction from their homes, relocation with family or friends, inability to meet their financial obligations, and increasing debts.

Defendants attempt to minimize the injury suffered by plaintiffs and the class they represent by pointing out that only a relatively minor percentage of claimants who appeal an adverse decision of an appeals referee obtain a decision from the board awarding them compensation benefits. Thus, for the great majority of claimants there is no true injury, because they are not entitled to any benefits and are not any worse off financially for not having received a speedier decision from the board. Although counsel for plaintiffs and defendants do not agree as to the precise percentage of claimants who obtain reversals from the board of adverse referee decisions, the percentage is somewhere in the range of 10-20 percent. Even this percentage, however, represents hundreds of deserving individual claimants who in all probability must forego a sustainable standard of living while waiting an overly long time for the board of review to decide their appeals.[3]

Balancing the Harm

It must be concluded that the continuing injury to plaintiffs and the class clearly outweigh any threatened harm that granting an injunction would inflict upon defendants. As discussed above, the substantial detriment to the members of plaintiffs' class in the absence of a preliminary injunction is clear.

The claimed harm to defendants presumably consists of a prospective impact upon the State budget as a result of having to hire and train sufficient numbers of additional personnel to process appeals in a more timely manner. The remarks of this court in another, but similar context are apropos:

> The fiscal burdens by Florida as a result of inadequate budgeting do not loom large in comparison to the direct, deleterious consequences to plaintiffs if an injunction is not ordered. Florida is possessed of alternative means of obtaining needed funds to avoid a budget deficit. Moreover, even assuming that the injury to defendant resulting from grant of an injunction will be substantial, the balance of the equities favors the party who is most likely to prevail on the merits—in this case, the plaintiffs.

Curtis v. *Page*, TCA 78-732, Order of April 13, 1978, at 6. *See also White* v. *Mathews*, *supra*. Moreover, since defendants are, quite commendably, attempting to eliminate the backlog of appeals and to whittle the time needed for appeals down to approximately that demanded by plaintiffs, the effect of an injunction at this time will simply be to require defendants to quicken the pace of their efforts.

The Public Interest

The public interest will be served by entry of a preliminary injunction in this case. The public policy of the United States, as strongly stated in the legislative history quoted by the Supreme Court in *Java*, is that eligible unemployment compensation claimants should not be unreasonably delayed in gaining benefits. Not only the economic well-being of the individual claimant is served thereby, but also that of the State and national economies as a whole.

ORDER

In accordance with the foregoing, it is *ordered and adjudged*:

1. Defendants' motions to dismiss are *denied*.

2. The motion of Beverly Smith to intervene as a party plaintiff is *granted*.

3. Defendants having at the hearing voiced no objection, and the court having determined that the requirements of Rule 23, F.R.Civ.P., are satisfied, plaintiffs' motion to certify the class is *granted*. The class shall consist of all persons who have filed or who will file an appeal to the Florida Unemployment Compensation Board of Review from an appeals referee's decision denying them unemployment compensation benefits pursuant to an intrastate claim and who have waited or will wait in excess of 60 days from the date of filing a notice of appeal for a decision to be issued to the board either

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[3] As defendants themselves point out, two of the named plaintiffs, Eddie Lee Gray and Jo Ann Rush, themselves received favorable decisions from the board of review (Defendants' Response to Plaintiffs' Motion for Certification of the Class, at pp. 4-5). The decision of the board in Mr. Gray's case came after a wait of 247 days (Affidavit of Eddie Lee Gray).

affirming, modifying, or reversing the decision under review. The representatives of this class shall include all the named plaintiffs, including intervenor Beverly Smith.

4. Plaintiffs' motion for preliminary injunction is *granted*. While this lawsuit is pending, defendants and their agents, employees, and successors in office are mandatorily enjoined to comply with the following measures for insuring that intrastate second-level unemployment compensation appeals are completed promptly:

(a) At least 80 percent of all appeals pending before the board of review on October 31, 1978, which were filed 30 or more days prior to that date must be disposed of no later than November 30, 1978.

(b) At least 80 percent of all appeals before the board of review on October 31, 1978, which were filed less than 30 days prior to that date, and at least 80 percent of all appeals filed subsequently to October 31, 1978, must be disposed of no later than 60 days after filing.

(c) Minor or temporary noncompliance with this injunction by defendants may be justified if it is the result of unanticipated events not the fault of defendants which necessarily affect the productivity of the board of review. If full compliance is at any time not possible, it shall be the responsibility of defendants to so notify the court in writing at the earliest possible time. Such notice shall contain a full statement of the reasons for noncompliance.

(d) The court reserves authority, upon motion, to enforce this injunction by appropriate sanctions.

WILLIAM STAFFORD
U.S. District Judge

Arizona B

Decision of Appeals Board
March 3, 1980

No. 7886-79, B-512-79 AC

Right of review:
Person entitled

Procedure 405.2

A petition for review, purportedly by the deputy whose determination was reversed by the appeal tribunal, was submitted to the board. Two signatures, neither of which was the deputy's, appeared in that portion of the petition reserved for signatures of the agency's representative and the unemployment insurance manager. The line reserved for the appellant's signature was blank. The agency's regulation required that the interested party or deputy petition for review, and that the petition be signed by the appellant. Its law limited the filing of petition for review to "an interested party or a deputy." *Held*, petition for review denied since there was no petitioner, the petition not having been perfected. To permit a supervisor or other person associated with a deputy to petition for appeal in the deputy's name would open the door for similar argument by *anyone* petitioning in the name of "an interested party."

Findings of Fact and Opinion

The board is presented herein with a petition for review, purportedly by the deputy whose determination was overturned by a tribunal decision dated December 5, 1979.

The petition contains two signatures, neither of which is the deputy's. The threshold question before the board is whether the persons whose signatures do appear therein have standing to petition the board. We note that the signatures which do appear in the petition are found in the "acknowledgment" portion of the petition reserved for the signatures of the department representative and the unemployment insurance (UI) manager, respectively.

However, the line reserved for the appellant's signature is conspicuously blank.

Department Regulation R6-3-1504 provides in part:

> A. . . . An interested party to an Appeal Tribunal decision, or the Deputy whose determination has been overruled or modified, may petition for review of the decision. . . . The petition must be signed by the appellant or his authorized agent.

A.R.S. Section 23-671 provides in part:

> C. Unless an appeal is withdrawn or the proceedings are removed or referred to the appeals board, an appeal tribunal, after giving reasonable notice and affording all interested parties reasonable opportunity for fair hearing, shall make a decision. The parties to the appeal shall be promptly notified of the decision and the reasons therefor. *The decision shall become final unless within fifteen days after mailing of the decision any interested party files a written petition for review with the appeals board* or the appeals board assumes jurisdiction in accordance with the provisions of subsection E of this section. (Emphasis added.)

A.R.S. Section 23-672 provides in part:

> C. In any case in which a petition for review of an appeal tribunal decision has been filed *by an interested party or by the deputy whose determination has been overruled* or modified, the appeals board may affirm, reverse, modify or set aside the decision of the appeal tribunal on the basis of the record in the case or may order taking of additional evidence. (Emphasis added.)

The law clearly defines the parties who may file a petition for review: an interested party or a deputy. The statute is clear on its face and leaves no room for further interpretation. By use of the disjunctive, the legislative expressed an opposition between the meanings of the words connected. It intended that only an interested party or the deputy whose determination was overruled to have standing to petition this board for review.

To say that a supervisor or any other person associated with a deputy has standing to petition in that deputy's name is to open the door for similar argument on the part of anyone attempting to petition in the name of "an interested party."

Finding no support nor provisions in the applicable law, the board accordingly must deny the petition for review on the grounds and for the reasons that:

There is no petitioner; the petition has not been perfected. The board is therefore without jurisdiction to proceed in this matter.

UNEMPLOYMENT INSURANCE
APPEALS BOARD
MARY A. BASS, *Chairman*
E. D. CROWLEY, *Member*
EUGENE R. MURRAY, *Member*

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FICHE

Oregon

COURT OF APPEALS

D. E. STANLEY, *et al v.* EMPLOYMENT DIVISION AND TELEDYNE WAH CHANGE

September 17, 1979

Compensation not payable
or no work done:
Leave of absence or vacation

Total and partial unemployment 80.15
Able and available 285

Because of decreased demand for its products, employer decided to shut down its plant for about 4 weeks during the summer. Agreement was reached with the union whereby each employee had three choices with respect to the shutdown period: (1) to take vacation with pay (2) to take leave without pay, or (3) to take a combination of the two. If leave without pay was chosen, no vacation benefits would be paid and the employee could take vacation later. All claimants elected vacation for all or part of the period; employees taking leave without pay and filing claims were not contested by employer. The agency announced that employees remaining in the area and available to return to work or accept temporary work with other employers would be eligible for benefits without having to actively seek work. Later, benefits were approved for all employees taking vacations, the referee affirming such action. *Held*, reversed since those taking vacations with pay did so *voluntarily*, instead of being on layoff without pay, which was compensable.

THORTON, J.

This is an appeal from an order of the employment appeals board (the board) holding claimants ineligible to receive unemployment benefits on the grounds that during a general plant shutdown claimants had elected to take vacation during that period and received vacation pay.[1]

In early 1978, the employer determined a need, due largely to a decreased demand for its products, to shut down its operation for approximately 4 weeks during the summer. Because the contract date for arranging such a shutdown had passed, the employer negotiated with the union and reached an agreement whereby each employee could elect to take vacation with pay, leave without pay, or combination of the two. In the event an employee elected leave without pay, no vacation benefits were paid and the employee was free to take his vacation later in the year. All claimants here elected vacation for all or part of the period; to the extent an employee elected to leave without pay, his claim for unemployment benefits was not contested by the employer.

Prior to the shutdown period, the employment division issued a blanket statement that employees who remained in the area and were available to return to work or to accept temporary work offered by other employers would be eligible for benefits without the need to actively seek employment. Subsequently, benefits were approved for all employees who had taken vacations during the period and, following a hearing, the referee affirmed this determination. On appeal, the board reversed.

This case turns on an interpretation of ORS 657.150(8), which reads:

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[1] Other assignments of error were made with respect to whether particular claimants were available for work during the shutdown period. Because of the disposition we make of this case, we need not consider them.

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> *Payment made* to an individual *for vacation taken* shall be considered in the determination of the amount of benefits payable with respect to the vacation period in the same manner as provided in subsection (6) of this section; however, notwithstanding any other provision of this chapter, *vacation payments made to an individual who is* terminated, or *placed on layoff status*, shall not constitute a disqualification and benefits payable under this chapter shall not be denied or reduced because of the receipt of any such payment. (Emphasis added.)

As a preliminary matter, we conclude that the statutory terms "payment made . . . for vacation taken" and "vacation payments made to an individual who is . . . placed on layoff status" are terms for this court to interpret under the test set forth in *McPherson* v. *Emp. Div.*, 285 Or 541, 591 P2d 1381 (1979). There is no indication that any policy judgment is required to determine the meaning of the terms or that the division's expertise is necessary to their elucidation. 285 Or at 549-50. The statute in question has twice been interpreted by this court, albeit pre-*McPherson*. *Wilson* v. *Emp Div.*, 34 Or App 289, 578 P2d 486 (1978); *Hawkins* v. *Emp. Div.*, 26 Or. App 445, 552 P2d 1325 (1976).[2]

The two clauses of ORS 657.150(8) contemplate two distinct situations in which vacation payments are made to employees. Where an employee voluntarily "takes" vacation and receives payment under his contract of employment, the first clause applies. The second clause applies where an employee who is terminated or laid off has accrued vacation time and payments are made by the employer to ease the financial strain while the employee is out of work. The essential distinction between the two situations is whether or not the payments are made for time an employee has *chosen* to take as vacation.[3]

The evidence here supports a finding that vacation time was voluntarily taken by these claimants. Admittedly, the shutdown was imposed in this case, but each employee had the choice to take vacation at this time, in which case he received vacation payments, or to treat the period as a layoff. If an employee chose to take vacation at a later date, no vacation payments were made and the employee was considered on layoff status and entitled to full unemployment benefits. All claimants here chose vacation and payments made to them were properly offset against unemployment benefits pursuant to the first clause of ORS 657.150(8). Since claimants chose to take vacation time and therefore were neither terminated nor laid off within the meaning of the second clause of ORS 657.150(8), the second clause has no application here.

Affirmed.

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[2] In *Hawkins*, the employer had scheduled a 2-week vacation over the Christmas holidays but desired an additional 3-week shutdown for economic reasons. When the shutdown began on November 30, each employee was given the vacation pay due him for the 2-week Christmas vacation. The referee in this case read *Hawkins* to require "some *a priori* agreement demonstrating that a claimant's vacation-unemployment is volitional, and not the result of the juggling of nomenclature after the decision to impose unemployment has been made." The agreement he apparently contemplated is one made according to the union contract and not the specially negotiated shutdown in this case. *Hawkins*, however, decided only that the vacation payments made at the beginning of the shutdown could be applied only to the 2 weeks formally designated as a vacation shutdown and could not be applied to disqualify an employee from unemployment benefits during the first 3 weeks of the shutdown. 26 Or App at 449.

[3] Where a collective bargaining agreement gives an employer the right to impose a vacation period on its employees, the first clause of ORS 657.150(8) applies, even though an individual employee might have chosen a different time, because the collective bargaining agreement has been ratified by the employees and the vacation period is in that sense voluntary. *Wilson* v. *Emp. Div.*, 34 Or. App 289, 578 P2d 486 (1978).

Washington

COURT OF APPEALS

June 9, 1980

DOUGLAS J. WYMAN *v.* EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF WASHINGTON

Type of compensation:
Damages or other award

Miscellaneous 340.2
Procedure 400
Total and partial unemployment 460.3

A member of the State police was discharged and eventually reinstated with back pay. In the interval he had received $5,894 in benefits. He was awarded back pay of $17,760 which, after deductions for income tax and pension of $4,889.57 and $7,500 for attorney fees, netted him $4,370.43. He was deemed overpaid because of receipt of back pay, i.e., not having been then unemployed. The sole issue on appeal was whether it was against equity and good conscience to require restitution. *Held*, overpaid $5,894, recovery not against equity and good conscience under the circumstances present. The employer-employee relationship had effectively never been severed. Although the amount of attorney's fees may appear "at first blush out of balance," the contingency-risk aspects thereof must be considered.

CALLOW, C. J.

Douglas A. Wyman appeals a determination of overpayment of unemployment compensation benefits.

Douglas Wyman was discharged by the Washington State Patrol on October 18, 1974. He applied for and received unemployment compensation for the weeks ending October 26, 1974, through February 28, 1976. The total benefit received was $5,894. Wyman brought a successful civil action for reinstatement and back pay. On February 3, 1976, he was awarded a judgment for back pay totaling $17,760 and was reinstated. The employer deducted $5,889.57 from the award for income tax and pension benefits. Wyman also paid attorney's fees to his private attorney in the sum of $7,500. The net sum which Wyman received was $4,370.43.

On April 16, 1976, the Employment Security Department issued a notice of overpayment to Wyman for the total amount of unemployment benefits he had received. The basis for the determination of overpayment was that Wyman had received back pay—remuneration—and was, therefore, not unemployed. Wyman appealed the determination of overpayment to the Employment Security Department Appeals Tribunal. He testified that the net amount he received for back pay was $4,370.43. He further states that his net monthly income was $811; his monthly expenses were $784. He had $1,800 in checking and savings accounts and could expect a $1,711 income tax refund. He owned a car and partial interest in a boat. He also said that his only debts were a $350 loan, a $100 per month boat payment, a $63 Veterans Administration repayment, and a $70 medical bill.

The commissioner of the Department of Employment Security affirmed the decision of the appeals tribunal. A petition for judicial review was filed

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and oral argument was presented in superior court. The only issue presented was whether it would be against equity and good conscience to require repayment of the benefits. The court found that the commissioner's decision was neither clearly erroneous nor arbitrary and capricious.

The petitioner's first contention is that the commissioner erred in concluding that he was not eligible to receive unemployment benefits. RCW 50.04.310 defines unemployment for the purpose of receiving unemployment compensation:

> An individual shall be deemed to be "unemployed" in any week during which he performs no services and with respect to which no remuneration is payable to him . . .

RCW 50.04.320 defines remuneration as "all compensation paid for personal services . . .". Wyman argues that he performed no personal services during the relevant period and was, therefore, unemployed.

An award of back pay to an employee who has been wrongfully discharged has been held to constitute remuneration under the Employment Security Act. *State* v. *Continental Baking Co.*, 72 Wn.2d 138, 431 P.2d 993 (1967). In *State* v. *Continental Baking Co.*, *supra*, a wrongfully discharged employee was awarded back pay by an arbitrator. The opinion said that the State may recover payments made under a mistake of law and may look to the party unjustly enriched by a mistaken payment for recoupment. *Schneider* v. *Hutt*, 87 Wn.2d 961, 558 P.2d 170 (1976), involved, however, a lump sum awarded to workers through their union which parceled it out to those who were wrongfully not reemployed. Some who received the money could not have received back pay. The court observed that the award was more like an award for damages for tortious conduct rather than an award of back pay for lost wages, since the sum ordered to be paid by the employer was so ordered because of the employer's breach of the working agreement.

Social Security Board v. *Nierotko*, 327 U.S. 358, 90 L. Ed. 718, 66 S. Ct. 637, 162 A.L.R. 1445 (1946), concluded that an award of back pay is compensation for personal services. The Social Security Act defined employment as "any service performed" by an employee. The Social Security Board urged, as does Wyman here, that the claimant had not performed any services. In rejecting this contention, the court held:

> We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

Social Security Board v. *Nierotko*, *supra* at 365–66 (footnote omitted).

In a concurring opinion, Justice Frankfurther pointed out other instances where an inactive employee was in the service of an employer:

> The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another though he be inactive . . . . This is, practically speaking, the ordinary situation of employment in a "stand-by" capacity . . . . The basis of a back-pay order under the National Labor Relations Act . . . is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time . . . . In short, an employer must pay wages although, in violation of law, he has subjected his employee to enforced idleness.

Social Security Board v. *Nierotko*, *supra* at 370–71 (citations omitted). *See also Arizona Dept. of Economic Security* v. *Lidback*, 26 Ariz. App. 143, 546 P.2d 1152 (1976); *Kerin* v. *California Unemployment Ins. Appeals 3d.*, 87 Cal. App. 3d 146, 150 Cal. Rptr. 751 (1978); *Griggs* v. *Sands*, ____ Tenn. ____, 526 S.W.2d 441 (1975) [MS-375.2-33, BSSUI]; *Texas Employment Comm'n* v. *Busby*, 457 S.W.2d 170 (Tex. Civ. App. 1970). We conclude that an award of back pay is compensation paid for personal services.[1]

Wyman next argues that the commissioner erred in not waiving the repayment of benefits. RCW 50.20.190 requires the repayment of overpaid benefits. RCW 50.20.190 reads in part:

> The commissioner may waive an overpayment if he finds that said overpayment was not the result of fraud, misrepresentation, wilful nondisclosure, or fault attributable to the individual and that the recovery thereof would be against equity and good conscience . . .

The petitioner argues that in light of the amount he actually received, it would be against equity and good conscience not to waive the repayment.

We may reverse the commissioner's finding that it would not be against equity and good conscience to deny waiver of Wyman's overpayment only if that decision is clearly erroneous in view of the entire record or arbitrary and capricious. RCW 34.04.130; *Ancheta* v. *Daly*, 77 Wn.2d 255, 461 P.2d 531 (1969) [LD-125.05-21, BSSUI]. Arbitrary and capricious action such as will justify reversal upon judicial review has been defined as willful and unreasoning action in disregard of the facts and circumstances. *Northern Pac. Transp. Co.* v. *Washington Util. & Transp. Comm'n*, 69 Wn.2d 472, 418 P.2d 735 (1966). The hearing examiner in this case considered extensive testimony concerning Wyman's financial situation. We have reviewed the record and are satisfied that the Employment Security Department conscientiously considered all the facts and circumstances in making its decision. Whether the commissioner considered the gross award of $17,760 or some lesser sum in arriving at his decision that Wyman's financial condition did not require waiver is immaterial to our conclusion that his decision was not arbitrary and capricious.

We also conclude that the agency action was not clearly erroneous.

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Ancheta v. *Daly*, *supra* at 259-60, quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 745, 68 S. Ct. 525 (1948).

The phrase "against equity and good conscience" is a general one. Its application will necessarily vary from one trier of fact to the next depending upon individual perceptions of justice and morality.

> [I]t involves a panoramic vision that encompasses all factors which might persuade an individual—or a government—of good conscience to forego recoupment of moneys previously paid.

Gilles v. *Department of Human Resources Dev.*, 11 Cal. 3d 313, 323, 521 P.2d 110, 116, 113 Cal. Rptr. 374, 380, 90 A.L.R.3d 970 (1974) [MS-340.2-67, BSSUI]. The petitioner's successful lawsuit for reinstatement resulted in a benefit to the employment security fund.

The amount of the attorney's fees charged the petitioner for prosecution of his suit for reinstatement and back pay, in light of the amount recovered, seems at first blush out of balance. We cannot say, however, that the contingent fee arrangement entered into between the petitioner and his attorney was unfair or improper. The attorney took the risk of performing services for nothing if success was not achieved. Success was achieved, the petitioner reinstated, and back pay ordered to be paid. We might have waived repayment of a portion of the unemployment benefits received under the circumstances, but we may not substitute our judgment for that of the superior court or the administrative body. *Ancheta* v. *Daly, supra*. Our review of the record fails to convince us that a mistake has been made. The purpose of the Employment Security Act is to systematically accumulate funds during periods of employment to lighten the burden of involuntary unemployment "which now so often falls with crushing force upon the unemployed worker and his family." RCW 50.01.010. That purpose was achieved here. During the period of his discharge, Wyman received $86 weekly, which allowed him to maintain himself though unemployed through a period of financial difficulty which ended when the petitioner was awarded full back pay and reinstated to his job. The act allows waiver of repayment only where the recovery would be "against equity and good conscience." The agency's action was not clearly erroneous.

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[1] In *Waters* v. *State*, 220 Md. 337, 152 A.2d 811 (1959) [TPU-460.3-39 BSSUI], the Maryland statute at issue provided for recoupment *only* where the unemployment benefits were paid by reason of nondisclosure or misrepresentation of a material fact. It was held that the possibility of receiving back pay did not prevent Waters from being "unemployed" and, therefore, there was no misrepresentation. The Washington statute, however, provides for recoupment irrespective of any misrepresentation or nondisclosure. RCW 50.20.190.

The judgment is *affirmed*.

CALLOW, C. J.

We Concur:

FRED DORE, J.
ANDERSON, J.

Florida A

[Affirmed, April 10, 1980, Florida U.A. Commission decision No. 80-0340, unpublished.]

Decision of U.A. Administrator No. 79-22930U
January 8, 1980

Attributable to, or connected with, employment

Voluntary leaving 50
Able and available 160.1

A union electrician in Florida earning $9.15 an hour quit to take hourly work in Arizona at $14.55 an hour. He looked for such work solely through his union, appearing daily at the union hall in Phoenix, Ariz. *Held*, voluntarily quit without good cause attributable to employer. Separation was, instead, for a personal reason, and employee was unavailable for work because of restriction to seeking work only through a union, contrary to the State law.

Findings of Fact

The claimant is a union electrician and a member of Electricians Union Local 915 in Florida. He desired to transfer to Phoenix, Ariz., and when he arrived in Phoenix, he signed up with IBEW Local 640. He reported to the union hall daily and started at position number 85 on the list but eventually moved down until he was assigned.

The claimant was employed by a St. Petersburg, Fla., electrical contractor at $9.15 per hour. As of December 16, 1979, his hourly wage in Arizona is $14.55, an increase of $5.40 per hour. There was work available with the Florida electrical contractor at the time the claimant voluntarily quit. The claimant appeared in a union hall in Phoenix, Ariz., daily from 1:30 p.m. to 3:30 p.m. from October 8, 1979, to December 14, 1979. He did not look for employment except through the union.

Conclusions of Law

The Florida Unemployment Compensation Law provides that an individual shall be disqualified for benefits for having voluntarily left his employment without good cause attributable to the employer. The proper standard for determining good cause is expressed in the case of *Uniweld Products, Inc.* v. *Industrial Relations Commission* 277 So.2d 827 (Fla. 4th DCA 1973). In that case the court held that good cause was that which would reasonably impel the average, able-bodied, qualified worker to give up his or her employment. Applying the *Uniweld* reasonableness standard to the facts in the instant case, the question must be answered as to whether good cause was attributable to the employer. There is no question that the claimant felt it was an excellent and understandable reason to leave a job which paid a certain amount and move to another part of the Nation with the prospect of a large hourly increase, but it was purely a personal matter and not good cause for leaving which was in any way attributable to the employer (-072768).

Further, the Florida Unemployment Compensation Law provides that an unemployed individual shall be eligible to receive benefits with respect to any week only as the division finds, among other things, that he is able and available and actively seeking work. To meet these requirements a person must make active, consistent, and conscientious contacts for work of a type he can reasonably expect to obtain, without placing undue restrictions upon himself which would lessen his chances of securing employment.

The Florida Statutes are predicated upon a right-to-work law and do not require an individual to be a member of a union to accept employment. Therefore, the claimant's desire to seek work only through a union is by his own free will and choice. I certainly recognize and am cognizant of the importance unions play in the lives of workers, including finding gainful employment, but an individual cannot continue to rely solely upon a labor union to find employment when the State law of the liable State does not require an individual to be a union member to accept work. The claimant actually restricts his availability for work when he is unwilling to accept work with other-than-union employers and relies solely on the union to send him out in accordance with his number and position on a register. Although an individual certainly may desire to seek work through a union, which is commendable and is one of the great needs for a union, if the union is unable to immediately locate work for the individual, the individual should seek other means of finding gainful employment. The file reflects that the claimant's only search for work has been through the union, and the search proved sucessful. The period of ineligibility covered a 1-week period from Sunday through Saturday and is the only period of ineligibility before this referee.

Decision

The determination of the claims examiner of November 21, 1979, holding the claimant to be disqualified for the week ended September 29, 1979, and until he becomes reemployed and earns $1,615 and further holding that the employer (-072768) shall not be charged with any benefits from this claim is hereby affirmed.

The determination of the claims examiner of November 30, 1979, holding the claimant ineligible for benefits from November 4, 1979, through November 10, 1979, is also affirmed.

GREGG L. FOX, *Administrator*
U.C. Appeals Section

Massachusetts B

Decision of Board of Review No. BR-06800
March 21, 1979

Domestic circumstances: General

Voluntary leaving 155.05, 515.35

A boilermaker, unable to find work near his home, secured employment in Arizona, leaving behind a wife and four children. While working there, his oldest child, a 14-year-old daughter, was injured in a school bus accident and had to wear a neck brace. Shortly before, an attempted break-in of his home occurred. Earlier in the year his wife had been hospitalized for a nervous condition. The subsequent incidents, in addition to her husband's long-distance absence, aggrevated her symptoms. She was continually in contact with him, and he, in turn, began to get nervous. Additionally, the job site was in the mountains and extremely cold weather periodically caused loss of work. The combination of adverse domestic factors and weather finally prompted claimant to leave work. *Held*, entitled to benefits if otherwise eligible since separation was involuntary, i.e., for urgent, compelling, and necessitous reasons.

The claimant's appeal is from a decision of the director which found that the claimant left his employment because of personal problems at home and because the snow and cold weather had resulted in the loss of a day's work; that he was aware at the time of hire he would have to reside in Arizona; that his personal problems were not in any way connected with his work; that inasmuch as the employer had no control over the weather, his leaving was voluntary without good cause attributable to the employing unit within the meaning of section 25 (e) (1) of the law; and that he is disqualified from receiving benefits for the week ending December 16, 1978, and until he has had at least 4 weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

Section 25 (e) (1) of the law is pertinent and provides as follows:

> Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for— . . .
>
> (e) The period of unemployment next ensuing and until the individual has had at least four weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount after he has left his work (1) voluntarily without good cause attributable to the employing unit or its agent, . . .
>
> . . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the director that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The claimant worked for the employing unit as a boilermaker from November 13, 1978, to December 7, 1978.

The claimant, unable to obtain work through his union locally, drove out to Arizona, a 4- or 5-day drive, in search of work. In Phoenix, Ariz., he was hired to work at a power plant that was being constructed in St. Johns, Ariz.

The claimant is married and has four children. In November 1978, while he was working in Arizona, his oldest daughter, who was 14 years of age, was injured in a school bus accident and was required to wear a neck brace. In addition, just prior to her accident, somebody had tried to break into their

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home. In February 1978, the claimant's wife had been hospitalized for nerves. The attempted housebreak and her daughter's accident had made her a "nervous wreck," especially with her husband being so far from home. She continually called the claimant to keep him informed of her situation. The claimant, realizing how far from home he was, began to get nervous. In addition, the job site was up in the mountains and because of the extreme cold he was losing days of work.

On December 8, 1978, the claimant was driving to work. The temperature was about zero with very strong winds. The weather factor, plus the knowledge his wife was a "nervous wreck" and wanted him home, made the claimant reach a decision. He turned his car around, picked up his belongings, and headed back to his family in Rhode Island.

After full review and consideration the board finds that the claimant, unable to find work locally, accepted employment in Arizona; that while he was away his daughter was injured in a school bus accident and somebody had attempted to break into their home; that his wife, who is nervous anyway, continually called and asked him to come home; that the claimant, realizing how far away he was from home and how much he was needed at home, left his work and returned to his residence in Rhode Island; that his reasons for leaving work were urgent, compelling, and necessitous in nature; that his leaving was involuntary; and that he, therefore, is not subject to disqualification under the provisions of section 25 (e) (1) of the law, quoted above.

The decision of the director is modified. The claimant is entitled to benefits if otherwise eligible.

STEVEN D. KARCHMAR
Chairman
SAUL GURVITZ
Member
JAMES L. ST. AMAND
Member

Louisiana

COURT OF APPEAL
SECOND CIRCUIT

June 10, 1980

LOLA A. BROWN *v.* ADMINISTRATOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY, HOWARD BROTHERS DISCOUNT STORES, INC.

Health or physical condition:
Illness or injury

Voluntary leaving 235.25, 515.05

Claimant, a discount store department head, quit after 10 months because of a nervous condition. Although her doctor indicated the condition was work-connected, he disclosed that it was not disabling and that he had not advised her to leave. She was denied benefits because of separation for personal reasons. *Held*, affirmed, termination having occurred for personal reasons and not for good cause connected with work since there was no evidence of a preexisting nervous condition and since her doctor felt she could continue working as usual. In fact, she left because of dissatisfaction with working conditions, reacting in a hypersensitive manner to routine situations.

J. JONES, Judge

Lola Brown appeals a judgment of the district court affirming a decision of the board of review denying her unemployment benefits. We affirm.

Mrs. Brown was employed by Howard Brothers Discount Stores as a department head for 2 years, 10 months, when she resigned her position. She applied for unemployment benefits, stating she quit because of a nervous condition. The claims interviewer of the Office of Employment Security found that a statement from plaintiff's doctor substantiated this reason. The statement affirmatively answered the question, "Was the patient's illness caused, aggravated, or worsened by his/her work?" The doctor, however, also stated that Mrs. Brown was able to perform her usual work and that he did not advise her to resign. Howard Brothers appealed the decision to the appeals referee, who reversed the agency's decision because she had left without good cause for personal reasons. Mrs. Brown appealed to the board of review which affirmed the action of the appeals referee. She then appealed to the district court.

The district court held there was no evidence of a preexisting nervous condition (other than the doctor's affirmative answer to the form question), and that according to the doctor, she was fully capable of working as usual. The court concluded the evidence supported the board's determination that Mrs. Brown quit because of mere dissatisfaction with her working conditions, which is not good cause connected with employment.

LSA-R.S. 23:1601(1) provides as follows:

> An individual shall be disqualified for benefits:
> (1) If the administrator finds that he has left his employment without good cause connected with his employment . . . .

Good cause has been defined as cause connected with the working conditions, ability of the employee to continue employment, and generally other

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factors which affect the employee's ability or right to continue. See *McGraw* v. *Director of Postal Data Center*, 319 So.2d 797 (La. App. 1st Cir. 1975).

Under LSA-R.S. 23:1634 we are limited to questions of law in our review of the board's action.

> Judicial review of administrative findings is thus ordinarily limited to determining (1) whether sufficient competent evidence supports the board's findings of fact and (2) whether, accepting valid administrative determinations of fact, the claimant is or is not under these facts legally entitled to unemployment benefits. *McGinnis* v. *Moreau*, 149 So.2d 188 (La. App.3d Cir. 1963) at p. 190.
>
> In a judicial review of the decision of the Board of Review the findings of the board as to facts, if supported by sufficient evidence, and in the absence of fraud shall be conclusive with the court's jurisdiction confined to questions of law. LSA-R.S. 23:1634. *West* v. *La. Board of Review*, 367 So.2d 55 (La. App. 4th Cir. 1979), at p. 56.

The initial determination made by the Office of Employment Security on August 1, 1978, was that Mrs. Brown quit because of a nervous condition and that this was good cause. A hearing was then held by the appeals referee, who made detailed findings of fact. The board of review then affirmed the referee's decision, finding after a review of the record, that the referee's decision was correct.

The referee found that Mrs. Brown had been occasionally reprimanded by her superior for excessive use of the telephone. The referee also found that Mrs. Brown was subjected only to normal corrections which any employee would be given. Although Mrs. Brown alleged she became upset and nervous because of the reprimands and therefore had to resign, the referee found that her leaving was due to personal reasons.

Our review of the evidence shows that the findings of fact are supported by sufficient evidence. Although Mrs. Brown submitted a doctor's statement that her "illness" was caused, aggravated, or worsened by her work, she freely admitted (the doctor's statement specifically stated she was able to work and had not been advised to quit) that her doctor had not advised her to quit. Mrs. Brown had had normal reprimands from her supervisor, but none were so severe that there was ever a thought of discharging her. No disciplinary report indicating a serious violation was ever filed for Mrs. Brown. The evidence reflects she reacted in a hypersensitive manner to routine corrections. Mere dissatisfaction with customary working conditions does not constitute good cause for leaving one's employment. See *Parish* v. *Brown*, 163 So.2d 860 (La. App.2d Cir. 1964); *Dunigan* v. *Adm. of Dept. of Emp. Sec.*, 351 So.2d 807 (La. App. 1st Cir. 1977); *McGinnis* v. *Moreau, supra*. The board found that Mrs. Brown's allegations of cutting remarks were unwarranted and that her only discipline was that to which all other employees were subjected. The employer's manager testified his reprimands were the type of daily remarks designed to keep employees on their toes and off the phones. Unless the employee's dissatisfaction with the working conditions is based upon discriminatory, unfair, or arbitrary treatment which renders the work unsuitable, the employee is without good cause. *Dunigan* and *McGinnis, supra*.

Mrs. Brown did not prove the working conditions were detrimental to her health. The work may have aggravated some "illness" as stated by the doctor's report, but this same report stated Mrs. Brown could have still performed her work capably and was under no medical suggestion to slow down, much less quit, her work. We note from the transcript of Mrs. Brown's testimony taken at the hearing before the appeals referee the following:

Referee: All right. Were you advised to leave by your doctor?
Claimant: No.
Referee: This was pressures of the job. You were having a personal health problem, was it?
Claimant: *No*. [emphasis added] It was just pressures on the job. It just got the best of me.

The record supports the conclusion that Mrs. Brown resigned because she developed an *unwarranted* mental attitude that she was being mistreated or harassed when in fact she was not being mistreated and her working conditions were totally normal. There is nothing unusual about an employee receiving reprimands for rule violations. Violation of employer rules directed at on-the-job personal telephone conversations frequently occurs in many work situations, and reprimands for these violations are certainly not unusual.

The evidence is sufficient to support the findings of fact of the referee and the board that Mrs. Brown resigned for personal reasons.

The case of *Southern Hardware and Lumber Company* v. *Vesich*, 250 So.2d 780 (La. App. 4th Cir. 1971) [VL-515.8-167, BSSUI] and the case of *Flournoy* v. *Brown*, 140 So.2d 729 (La. App.3d Cir. 1962) [VL-450.2-11, BSSUI] cited by Mrs. Brown do not support her contention that she resigned for good cause connected with her employment. *Southern Hardware, supra*, involved a situation in which the resigning employee was hit by a customer, and when he complained was then lectured to by his employer.

Receiving absolutely no support from his employer in this type of situation was held to be good cause for leaving, and the employee received unemployment benefits, but the case is so factually dissimilar to this one as to be of no aid. In *Flournoy, supra*, the employee was denied unemployment compensation because his allegations of discriminatory treatment were unsupported by the evidence and therefore the employee left without good cause.

Mrs. Brown also cites *Harris* v. *Woodcrest Mobile Homes*, 359 So.2d 243 (La. App.2d Cir. 1978). *Harris* involved a worker who became allergic to the fiberboard dust around which his employment required him to work. We held there that a working condition which is detrimental to one's health constitutes good cause for leaving one's employment. In that case the claimant's doctor would not permit him to return to his former job because of the danger to his health. Here Mrs. Brown's doctor neither advised nor required her to leave her job but considered her able to work. This distinction is most crucial, since it clearly demonstrates the lack of necessity for Mrs. Brown to quit her job.

Judgment is *affirmed*.

South Carolina

COURT OF COMMON PLEAS
COUNTY OF ALLENDALE

November 22, 1979

DAISY MAE FREDERICK *v.* TEXTRON, INC. SHYRON/CONTINENTAL DIVISION AND THE SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

Health or physical condition:
Illness or injury

Voluntary leaving 235.25, 190.1

A dispatcher in a textile mill for 5 years experienced bronchial problems in the beginning of her employment and intermittently thereafter. She was hospitalized for 1 month, during which the problem cleared up. But when she returned to work, her adverse symptoms resumed and she quit on advice of her doctor. Benefits were denied because she did not "clearly establish by conclusive evidence that the plant environment caused her bronchitis." *Held*, reversed, "the burden of proof" to the contrary. It is not material that her subjective reaction to a common substance had little effect on other workers. It was not necessary for her to establish that her bronchitis was caused solely by the work she was doing. If the work contributed to her illness or caused an aggravation of it, she was justified in seeking other employment.

This is an appeal by petitioner pursuant to section 41-35-750 of the S.C. Code (1976) from a decision of the South Carolina Employment Security Commission. She seeks reversal of the commission's ruling denying her benefits on the ground that she had "good cause" to leave her employment due to the aggravation of a bronchial condition. The decision of the commission is reversed.

Petitioner was employed by Textron as a dispatcher for approximately 5 years before resigning in April 1979. She began having bronchial problems shortly after she began work in 1975 and she continued to have intermittent problems during her years of employment at Textron. The petitioner's bronchitis became more severe and she was hospitalized in March 1979. This problem cleared up during the 1 month period the petitioner was away from work. However, upon returning to work, her symptoms immediately became worse. Because of this and on the advice of her treating physician, she resigned.

Section 41-35-120 provides that when a worker has voluntarily quit her employment without good cause, she shall be ineligible for compensation benefits. "Good cause" as used here ordinarily means a cause attributable to or connected with the claimant's employment. *Stone Mfg. Co.* v. *S.C. Employment Security Commission*, 219 S.C. 239, 64 S.E.2d 644 (1951) [VL-210-7, BSSUI]. The appeal referee interpreted this to mean, and the commission concurred, that the petitioner must clearly establish by conclusive evidence that the plant environment caused her bronchitis. This is not the burden of proof required of the petitioner.

Our Supreme Court has not addressed the issue presented in this case, and the courts of other States are not in agreement as to whether leaving employ-

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ment because of illness or disability constitutes voluntary quitting with good cause. See 76 Am. Jur. 2d, *Unemployment Compensation*, section 64; 14 ALR 2d 1308. However, "the unemployment compensation law is remedial in nature and should be liberally construed to give effect to it beneficial purposes," *Hartsville Cotton Mill* v. *S.C. Employment Security Commission*, 224 S.C. 407, 79 S.E.2d 381 at 384 (1954) [MS-75-7, BSSUI], and therefore the better approach would be to allow compensation where an employee is unable to continue in her work due to the fact that conditions at her plant aggravate an existing medical problem.

The commission's conclusions that the petitioner's unemployment was brought about because of a nonoccupational disability is not supported by the evidence. The statement of Dr. James DeLoach in the record and the petitioner's testimony show that she left her unemployment for the sole reason that she was allergic and made ill by the dust and chemicals present at her place of work. It does not matter that this allergic reaction is to a common substance that has little effect on other workers. The question concerns how this particular claimant is affected by her working conditions and does not involve the question of whether the plant is maintained in a reasonably safe and acceptable condition.

It is not necessary for the petitioner to establish that her bronchitis was caused solely and only by the work she was doing. If the work was a contributing factor to the illness or caused an aggravation of an existing illness, then petitioner was justified in seeking other employment. Working conditions which are detrimental to health constitute good cause for leaving one's employment. Since the petitioner is able and available for work and is seeking employment, she is entitled to benefits under the unemployment compensation law.

IT IS THEREFORE ORDERED that the decision of the South Carolina Employment Security Commission is reversed and the petitioner, Daisy Mae Frederick, is entitled to benefits pursuant to the S.C. Employment Security Act.

C. VICTOR PYLE, JR.,
Presiding Judge
Fourteenth Judicial Circuit

Louisiana

COURT OF APPEAL
SECOND CIRCUIT

March 3, 1980

WENDELL SANDERS *v.* STATE OF LOUISIANA, OFFICE OF EMPLOYMENT SECURITY AND POSTAL DATA CENTER

Pension-retirement

Voluntary leaving 345

A U.S. Postal Service rural mail carrier, after 38 years of employment, voluntarily quit and applied for benefits. When doing so, he left blank the answer to the question asking why he retired. However, he informed the appeals referee that the reason was that about 1½ years previously 23 miles were added to his mail route, requiring about 2 more hours of work a day, for which he was compensated. The increase did not require him to work more than 8 hours daily. He contended he did not voluntarily retire but was forced to do it because of the additional workload. Yet his doctor did not advise him to quit and he worked 1½ years after the increase. *Held*, voluntarily quit without good cause connected with his work since he had failed to cite the increased workload as the reason for retiring when initiating claims. He actually gave no reason at that time and only brought up the mileage factor after benefits had been denied, a self-serving implication apparent. Health and occupational factors justifying the separation are not present.

JONES, J.

Plaintiff, Wendell Sanders, appeals a judgment of the district court affirming a decision of the board of review of the Louisiana Office of Employment Security which denied him unemployment compensation. We affirm.

Plaintiff was employed by the U.S. Postal Service for approximately 38 years as a rural mail carrier stationed in Eros, La. Plaintiff received an annual salary of approximately $19,300. In March 1979 he voluntarily quit his job and applied for unemployment benefits. On his application form plaintiff left blank the answer to the question "Why did you retire?" However, before the appeals tribunal for the Office of Employment Security plaintiff revealed that the reason for his retirement was the extra mileage placed upon him by his employer.[1] One and one-half years before his retirement plaintiff had been given an additional 23 miles on his mail route which required about 2 more hours work per day. Plaintiff's salary was increased on a per mile basis to compensate him for the extra mileage.

The board of review found plaintiff disqualified for benefits under the provision of LSA-R.S. 23:1601[2] because he left his employment "without good cause connected with his employment." The trial court affirmed this decision.

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[1] Appellant was initially determined disqualified at the agency level which decision was affirmed at the hearing before the appeals referee and thereafter affirmed by the board of review which accepted the referee's findings of fact.

[2] LSA-R.S. 23:1601 – "An individual shall be disqualified for benefits:

(1) If the administrator finds that he has left his employment without good cause connected with his employment . . ."

Appellant's primary contention is that he did not voluntarily retire, which is clearly termination for personal reasons not connected with employment, but that he was forced to retire because of the additional workload.

Under LSA-R.S. 23:1634 this court must accept the board's factual findings when they are supported by the evidence. Our review is limited to questions of law.

> In a judicial review of the decision of the board of review the findings of the board as to facts, if supported by sufficient evidence, and in the absence of fraud shall be conclusive with the court's jurisdiction confined to questions of law. LSA-R.S. 23:1634. *West* v. *La. Board of Review*, 367 So.2d 55 (La. App.4th Cir. 1979), at p. 56.

The board found that plaintiff was not required to retire by his doctor. The board also found that the "claimant felt that the workload was too much for him and he did retire voluntarily from his employment." The fact that plaintiff worked for 1½ years before he retired is a fact from which the referee could draw the inference that the additional workload did not bring about the retirement. Had it been true that the extra work had caused the retirement, then the retirement would have occurred much earlier than 1½ years after the change in the work schedule.

A change in working conditions ordinarily does not justify the employee in terminating employment. In order to qualify for unemployment benefits the change in the working condition must be one that substantially alters the nature of the employment. *Parish* v. *Brown*, 163 So.2d 860 (La. App.2d Cir. 1964). An employee who resigns because of dissatisfaction with the customary working conditions does not have good cause to leave his employment. *Parish, supra.* The board found the plaintiff's rural route has been restructured to give better service to the patrons. Plaintiff's own testimony revealed the adjustment was made to equalize the load between plaintiff and the other rural carrier since the other rural route was overloaded. There is sufficient evidence to support the board's finding, and an additional 23 miles per day is not such a substantial change in the nature of the work as would warrant plaintiff to leave with good cause. Unless the dissatisfaction with the working conditions is based upon unfair treatment (which, here, it was not) or upon a substantial change in the working conditions from those in force at the time plaintiff's employment began (which an additional compensated 23 miles is not), plaintiff has no good cause to leave. See *Dunigan* v. *Adm. Dept. of Emp. Sec.*, 351 So.2d 807 (La. App.1st Cir. 1977). It is important to note that plaintiff was paid for his extra labors and the extra mileage did not require him to work more than 8 hours per day.

Plaintiff initially filled out an unemployment compensation form giving no reason for his voluntary retirement and without mentioning the increased workload. This circumstance is a basis for the appeals referee to infer that the retirement had no relationship to the work. Only after plaintiff was denied his unemployment benefits in the initial interview did he take the tack before the appeals referee that he was forced to retire. A board of review is justified in believing plaintiff's signed statement made at an unsuspicious time rather than the later made self-serving statement. See *Jenkins* v. *Heard*, 92 So.2d 287 (La. App.2d Cir. 1957), in which the claimant put down the failure to get a raise as the reason for leaving his job on the application for unemployment compensation and then later claimed at the hearing he quit because he had pneumonia; *Baker* v. *Sharp*, 110 So.2d 209 (La. App.1st Cir. 1959), in which plaintiff first claimed she left because she had no one to care for her children, and then later claimed she had a medical certificate justifying her leaving; and *Decker* v. *Off. Emp. Sec.*, 359 So.2d 1325 (La. App.4th Cir. 1978), in which plaintiff first stated she left her employ because of foul language used at work and then at the hearing claimed she quit because she was being medically treated for hypertension. It is significant that plaintiff here left blank the answer to the question inquiring why he left his job and then later testified he left because the load had become too heavy. The fact that appellant continued *without complaint* for 1½ years in his job with the extra load justified the board in drawing the inference that plaintiff's retirement was without connexity to the extra 23 miles added to appellant's route.

Plaintiff testified before the referee that "it just got to where it was too much, too nerve-racking for me." He admitted that no doctor had told him to retire. The mental attitude that plaintiff developed about the job which he had been performing for 1½ years being "nerve-racking" cannot be considered job related when there is no evidence showing there was anything about the work that brought about plaintiff's sudden change in attitude.

This case is comparable to *Simon* v. *Adm. Emp. Sec.*, 281 So.2d 165 (La. App.4th Cir. 1973), where a man had glaucoma and for that reason could not see to do his work and had to quit. There was no evidence that the eye condition was brought about by the employment and therefore the cause of termination was not job related, but was personal. In the decision of *Wells* v. *Lockwood*, 371 So.2d 1192 (La. App.1st Cir. 1979), the employee quit his job after 23 years, 4 months, because he felt he could no longer perform the heavy labor required of him as a bevel operator. The court there held, "Wells retired because of his physical condition, but it had not been proved that his condition was brought about, worsened, or aggravated by his employment." *Id.* at 1194. The court made the observation, "The more obvious deduction is that aging and natural progress of Wells' two ailments [diabetes and enlarged esophagus vein] caused the decline in his ability to do heavy work." *Id.* at 1194. The court here held that the reason for plaintiff's terminating his job was a "nonrelated job condition" and affirmed the denial of unemployment compensation.

In *Neal* v. *Adm., Div. of Emp. Sec., Dept. of Labor*, 197 So.2d 393 (La. App.2d Cir. 1967), benefits were denied to a claimant who resigned his position because of pain and inability to perform his duties due to spinal arthritis. The court found his condition had not been worsened by his employment and therefore his reason for leaving was not job related.

If substantial physical disabilities that are not job-related are held to be personal reasons for terminating employment, the same result must follow when an employee leaves work he has been performing for 1½ years giving as his reason for leaving his mental attitude toward the work described as "too nerve-racking for me."

Judicial review of administrative finding is thus ordinarily limited to determining (1) whether sufficient competent evidence supports the board's findings of fact and (2) whether, accepting valid administrative determinations of fact, the claimant is or is not under these facts legally entitled to unemployment benefits. *McGinnis* v. *Moreau*, 149 So.2d 188 (La. App.3d Cir. 1963) at p. 190 [VL-190.05-33, BSSUI].

There is more than sufficient evidence to support the determination that plaintiff quit without good cause connected with his employment.

The judgment is *affirmed* at appellant's cost.

Rhode Island

DISTRICT COURT
SIXTH DIVISION

ANN NEVIN *v.* DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW

June 25, 1980

Working conditions: Duties or requirements outside scope of employment

Voluntary leaving 515.3, 190.05

A retail store salesperson, employed for 2 years after a 24-year absence from the labor fòrce, refused to substitute for the store manager while the latter was to be on vacation for 1 week. Among her functions then would be preparation of a daily sales report, responsibility for all money generated by sales, and making daily bank deposits. She would not receive extra compensation for assuming these managerial duties. The evidence was in conflict as to whether her separation was voluntary. *Held*, voluntarily left with good cause since, in the final analysis, claimant had no prior managerial experience and assumption of responsibility for sales money, even for 1 week, rendered the job unsuitable. Since sufficient evidence of *voluntary* leaving was present, despite other conflict, the court, which may have differed in such conclusion, could not substitute its judgment for that of the board.

Decision

PLUNKETT, J.

This matter came before the court on petitioner's suit to reverse a decision handed down by the board of review of the Rhode Island Department of Employment Security. In their two-to-one decision, the board upheld an October 5, 1978, decision of the referee. In his decision, the referee concluded that petitioner voluntarily left her employment without good cause and was therefore not entitled to receive unemployment benefits.

The basic facts are uncontested. Petitioner was employed for 2 years as a salesperson at a local retail store. Her last day of work was July 20, 1978. On that day she had a meeting with the owner of the store. The owner questioned her as to her refusal to substitute for the store manager. The manager was planning to vacation for 1 week. The uncontradicted testimony of the petitioner indicates that after she again refused to substitute for the store manager, she asked the owner what she should do. The owner remained silent. Petitioner then asked whether she should leave. The owner responded, "I think you just better." With that, the petitioner left the store.

The record discloses a difference of opinion as to what was actually expected of the petitioner. However, at the very least, she would have to complete a daily sales report, be responsible for all of the money generated by sales, and make daily bank deposits. The record further discloses that petitioner was not to receive extra compensation for the assumption of these managerial duties. Finally, the record indicates that petitioner was graduat-

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ed from high school in 1944 and had recently reentered the job market after a 24-year absence as a homemaker.

The board of review upheld the referee's October 5, 1978, decision and adopted it as their own. Petitioner argues that the board, in so deciding that she left work voluntarily without good cause under R.I. G.L. section 28-44-17, was in error.

The court must initially decide whether petitioner left her employment voluntarily. If so, the court must then decide whether she left with good cause. In reviewing decisions of the board, the court is limited by R.I. G.L. section 42-35-15(g) which provides:

> (g) The court shall not substitute its judgment for the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) in violation of constitutional or statutory provisions;
> (2) in excess of the statutory authority of the agency;
> (3) made upon unlawful procedure;
> (4) affected by other error of law;
> (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) aribtrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Conflicting evidence was presented on the question of whether the petitioner left her employment voluntarily. At both hearings, petitioner indicated that she felt she had no choice but to quit. A review of her testimony leaves the court with the impression that this was probably the petitioner's reason for quitting. However, after reviewing the entire record, the court will not substitute its judgment for that of the board. The record contains testimony of other witnesses and the employer's report which stated that the petitioner left voluntarily. The employer's report alone provides a basis of substantial evidence for the board to consider in making its determination. *Whitelaw* v. *Review Board*, 95 R.I. 154, 185 A.2d 104 (1962). The board's determination that petitioner quit voluntarily is therefore upheld.

It must now be determined whether petitioner's voluntary leaving was for good cause under R.I. G.L. section 28-44-17. The determination of what circumstances will constitute good cause is a question of law to be resolved by the court. *Murphy* v. *Fascio*, 115 R.I. 33, 340 A.2d 137 (1975). In determining the parameters of just cause, as in construing any section of the Employment Security Act, the court must seek to give as broad an effect to its humanitarian purpose as may be reasonable in the circumstances. *Harraka* v. *Board of Review*, 98 R.I. 197, 200 A.2d 595 (1964). [VL-515.05-35, BSSUI and VL-515.05-41, BSSUI]

The referee did not find that the assumption of managerial duties was part of petitioner's job. See *Whitelaw* v. *Board of Review, supra*. Rather, he based his decision upon the duration and his assessment of the difficulty of these new duties. Past Department of Employment Security decisions indicate that good cause may exist where resignations are based upon either the addition of new duties (Ref. Dec. No. 4534, 1B UN. INS. Rep. (C.C.H.) section 1975.947 (1945)) or a change in duties from those required at the initial hiring. (Ref. Dec. No. 2017, 1B UN. INS. Rep. (C.C.H.) section 1975.951 (1942).) Good cause for voluntarily leaving employment connotes adequate excuse that will bear the test of reason, just grounds for action, and good faith. *O'Donnell* v. *Board of Review*, 173 Pa. Super. 263, 98 A.2d 406 (1953).

The record indicates that plaintiff was hired as a salesperson. When the present owner took over the store a year before petitioner's termination, there was no suggestion that she would be expected to occasionally assume managerial duties.

The court is in agreement with the dissenting board member's opinion. The additional duty of being responsible for all of the money generated by sales, even for the period of 1 week, was in this particular case good cause for termination. Petitioner had no previous managerial experience. She wasn't given a choice. Rather, she was ordered to assume responsibility for all of the money generated during a week of sales. Job unsuitability or inability to perform assigned work are generally accepted as constituting good cause for termination. See *Cahoone* v. *Board of Review*, 104 R.I. 503, 246 A.2d 213 (1968). The record indicates that petitioner believed these managerial duties were beyond her present scope of competence. Nothing appears in the record which would indicate that petitioner's beliefs were unfounded. Occasionally, claimants are required to assume their new duties for a trial period. However, the court is unaware of any case in which a hesitant claimant was required to be responsible for large amounts of cash for a trial period. Shortages during such a period could lead to termination or even criminal prosecution. The hesitant employee should not be forced to take such a risk.

The court finds that petitioner voluntarily left her employment with good cause and is therefore entitled to unemployment security benefits. The board of review is *reversed*.

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Report 331-1
December 1980

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Unemployment
Insurance Service
Prepared by Division of Program Policies and Legislation
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Washington, D.C. 20213

L37.209:

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Arkansas B

[Affirmed, August 13, 1980, Circuit Court of Garland County, Arkansas, decision No. CIV 75-350, unpublished.]

Decision of Board of Review No. 75-BR-19EB
June 30, 1980

Attendance at school or training course

Able and available 40, 160.1, 160.15

A full-time shift employee, before layoff, arranged to work straight days while attending community college night classes. Before enrolling, according to claimant, he was advised by his local office that he would be eligible for benefits while attending school; he did receive benefits. However, when he later disclosed that he attended school 3 hours nightly, 6:30 to 9:30 p.m., Monday through Thursday, unemployment payments stopped. While laid off, he actively sought work but was rejected by prospective employers because he was subject to recall by his former employer. He had transportation to and from work, was physically and mentally able to work, and, while schooling would have flexibly blended with any work secured, he was willing to drop it if necessary. *Held*, reversed and eligible for benefits since claimant was realistically attached to sources of employment. The crux of the matter is whether a claimant is a student incidentally looking for work or a workingman attending school in his spare time.

The claimant appealed to the Circuit Court of Garland County, Ark., from the first decision of the board of review, rendered in this case on October 9, 1975, holding the claimant ineligible for unemployment benefits under the provisions of section 4(c) of the Arkansas Employment Security Law, up to and including the date of the appeal tribunal hearing, September 5, 1975. Subsequently, the court remanded the case to the board of review for the taking of additional evidence concerning his intentions about employment and school attendance.

After due notice to the interested parties, a hearing was held for the board of review on April 20, 1977, in Hot Springs, Ark. The full board of review met in session on June 30, 1977.

From the record and testimony, the full board of review makes the following:

Findings of Fact and Conclusions of Law

Until December 5, 1974, the claimant was a full-time employee of a metals company. On that date, he was laid off for lack of work. Prior to the layoff, the claimant had been considering taking college courses for credit while working for his employer. Since he performed shift work, he spoke with his foreman and arranged to work straight days if he attended night classes. The shift he worked was his choice, not the company's.

According to the claimant, before he began college, he checked with the local Employment Security Division office to determine the effect attending school would have upon his drawing unemployment benefits. The record shows that benefits were being paid at the time. He said that he was informed that he could draw benefits even while attending school. On August 27, 1975, the claimant notified the Employment Security Division that he was attending night classes at a local community college 3 hours a night from 6:30 to 9:30 p.m., Monday through Thursday. The agency then stopped paying unemployment benefits. While laid off, the claimant made reasonable efforts to secure other work at five other companies. Since he was subject to being recalled by the metals company, these employers refused to employ him.

The claimant had transportation to go to and from work. He was physically and mentally able to work and stated that he was willing to accept work and quit school if work was available.

The community college apparently offered daytime courses as well, and gave each student the option as to the time of day he or she would attend classes. Had the claimant been successful in finding other work during his layoff, or had he been recalled by the metals company, regardless of shift, he could have made arrangements to go to school either during the day or at night to avoid a conflict with his work schedule. As stated earlier, had he been recalled to work at the metals company, he had the right to choose which shift he would work.

The agency determination of ineligibility under section 4(c) of the law and the appeal tribunal affirmation of that determination were based on the fact that the claimant had earned his wage credits in regular employment with no restrictions on the hours he could work. It is recognized that he had made an active search for work. Following a longstanding policy of the agency that automatically made a claimant ineligible for benefits if he were attending school during the hours that he had earned his wage credits, the determination was affirmed by the appeal tribunal. This decision of the ineligibility was affirmed in the first decision of the board of review in this case.

Section 4(c) of the Arkansas Employment Security Law provides that claimants will be eligible for benefits if they are unemployed, physically and mentally able to perform suitable work, available for work, and doing those things which a reasonably prudent individual would be expected to do to secure work.

It is clear that an individual laid off because of lack of work is entitled to draw unemployment benefits if he is otherwise eligible. It is equally clear that a claimant is ineligible for benefits under section 4(c) of the law if he makes himself unavailable for work and is not actively making a reasonable search for work. It appears that no Arkansas case has decided the precise issue before us—that is—when attending school makes a person unavailable for work.

The matter has been considered in a number of other jursidictions. There is an excellent annotation on this subject under the title of "Unemployment Pay—Selective Work Time" in 35 ALR3d 1129. Most of the cases have held that where a person is primarily a student and is seeking to draw unemployment benefits while looking for work on the basis of selective hours that he is available to work, such person will be denied benefits. Another situation in which benefits were allowed is found in *Wiley v. Unemployment Compensation Board of Review,* 195 Pa. Super. 256,171 A2d 810(1961)[AA 40-67, BSSUI]. There, after the claimant was laid off for lack of work, he began attending college. He was 28 years old, had a wife and two children, and had been continuously employed for several years by Westinghouse Electric until his layoff. The claimant testified that if he should get a daytime job he would be willing to change his classes to night, or if necessary, drop out of school altogether to secure full-time employment. After sincere efforts, the claimant was successful in securing other full-time work, but continued attending college either full or part time during his off hours. On these facts, the court held:

> The record discloses that appellant was and is realistically and genuinely attached to the labor market. He does not fall into the category of an ordinary college student whose primary purpose is to obtain an education, and who is available for work only conditionally or on a limited basis. Attendance at college was not this appellant's primary purpose. His work record and his sincere efforts to obtain employment substantiate the fact that his chief responsibility is the support of his family. His conduct unquestionably meets the requirements of good faith. In the absence of proof that appellant refused suitable employment, he should not be denied benefits. pp. 811–12.

Other courts have said that to be "available" for work so as to be eligible for unemployment benefits, a claimant must be attached to the labor market. *Golden* v. *Industrial Commission of Missouri,* 524 S.W. 2d 34 (Mo. Ct. App. 1975). Benefits cannot be denied merely on the basis that the claimant is a full-time student. Student-claimants who are ineligible are those who limit their availability for work to particular times, days, or periods that do not interfere with their primary objective of obtaining a formal education. *Id.*

The board of review adopts the reasoning in the *Wiley* case that the proper distinction to be made is whether the claimant is a student incidentally looking for work or whether he is primarily a workingman who is incidentally attending school in his spare time at hours available to him when he is not on a job. A claimant should not be automatically denied benefits because he is attending school at a time when he worked to earn his wage credits. The question to be decided is an individual one in each case; that is, whether a claimant although attending school part time is realistically in the labor market, looking for a job, and available for work. We have decided this case on the facts in this record. Plainly, the claimant's primary interest was working rather than attending school. There is no evidence to indicate that the claimant limited his availablity for work to any particular times, days, or periods in order to interfere with school attendance. Attending college would not have conflicted with any job the claimant might have successfully obtained. The community college he attended offered courses both at night and day. Students in the college were given an option as to which times classes would be attended. Had claimant been recalled by the metals company regardless of shift, or had he been successful in finding other work, he could have easily arranged to attend classes at a time which would have avoided conflict with his work schedule.

The board concludes from the original record together withe supplemental record made on remand from the Circuit Court that the claimant should not have been declared ineligible under the provisions of section 4(c) of the law.

Since the record does not clearly reflect the times that the claimant was laid off or was claiming unemployment benefits, it will be necessary for the agency to make a determination of the times for which he should be paid.

Decision

Reversed. The first decision of the board of review affirming the appeal tribunal decision denying the claimant unemployment benefits under the provisions of section 4(c) of the Arkansas Employment Security Law, is *reversed.* The agency is directed to determine the periods of time during which the claimant was actively seeking work and to allow him benefits for those periods.

EDWIN E. DUNAWAY, *Chairman*
TOM LANDERS, *Member*

Kentucky B

Unemployment Insurance Commission
September 15, 1980

No. 22361

Time:
Shift

Able and available 155.1, 365, 450.5
Suitable work 210

A divorced mother, having custody of two adolescent children, last worked on the day shift for 3 years as a registered nurse at a hospital. She was judged unavailable and ineligible for benefits because of restriction to the first shift in seeking employment, a restriction her therapist advised. During her entire work history as a nurse, she had worked parttime or fulltime on the first shift. She extensively contacted hospitals, physicians' offices, school systems, and factories in Kentucky and Indiana. She contended that she *preferred* the first shift, but would not refuse offers of work on the second or third shifts and was prepared to secure reliable care for her children if necessary. There was no evidence of the size of the labor force in nursing on the first shift. *Held*, reversed and eligible for benefits, since, in the final analysis, she was genuinely attached to the labor force under the circumstances present. This conclusion was supported by substantial judicial agreement in other jurisdictions, and also reflected changed local policy dictated by changed conditions, i.e., effectively, of the family in the culture.

Facts and Reasoning

The claimant, by counsel, appeals from a referee decision mailed February 11, 1980, affirming an adjusted determination and holding her ineligible for benefits from December 23, 1979, and thereafter until conditions substantially change on grounds she was unavailable for work.

Claimant, a divorced mother who has custody of two adolescent children, was last employed as a registered nurse on the day shift at a Louisville hospital. She held the position for more than 3 years, and was involuntarily separated from the employment in October 1979. She filed a claim for benefits and it was established that she had been terminated for unsatisfactory work performance during an imposed probationary period, a condition for which she was awarded benefits without disqualification. Thereafter, she remained unemployed, although looking for work, and filed continuing claims for benefits.

In December 1979, claimant advised her local office that she was seeking first shift work only because she was needed at home to care for her children during the evening and late night hours. Benefits were denied as a result on grounds that a restriction to first-shift work impaired her employability and effectively rendered her unavailable for work.

Claimant pursued an appeal from the determination, and at the hearing she gave the only testimony. Her statements may be summarized as follows: During her entire employment history, she had worked mainly as a registered nurse, either parttime or fulltime, on the first shift. Before becoming a nurse she had worked for 1 year as a clerk for the census bureau. She was ready to accept work in all areas of her profession during the first shift because she had been strongly advised by a family therapist to be with her children after school and during the evening. Competent evidence support-

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ing her contention was submitted to the commission for its review following the referee hearing. Indeed, claimant has made an extensive but unsuccessful search for first-shift employment with hospitals, physicians' offices, school systems, and factories in both Kentucky and Indiana; moreover, she will not refuse second- or third-shift work if offered, and is prepared to secure reliable care for her children if necessary.

Aside from claimant's testimony, no evidence was received at the hearing concerning the size of the labor market for employment in the nursing profession within her time restrictions.

In affirming the examiner's denial of benefits, the referee reasoned:

> KRS 341.350 (4) requires as a condition of eligibility for unemployment benefits that the unemployed worker be available for suitable work and that she exert reasonable effort to obtain it.
>
> Suitable work is that most fitted to the worker's training and experience. For claimant suitable work is work as a registered nurse. Reasonable efforts to find suitable work must necessarily be motivated by the worker's willingness to perform such work during the hours that characterize it. Generally speaking, the nursing profession is one pursued around-the-clock. This is especially true with respect to nursing home and hospital duty, in which claimant is experienced, as distinguished from industrial duty, in which she is not.
>
> Given her work background claimant cannot be considered available for suitable work if her employability is restricted to first shift duty. Although she insists that first shift work is more a matter of preference than necessity, the weight of evidence is that, because of considerations regarding the proper care of her children, she has no genuine interest in working other than first shift hours. That restriction is a material impairment of employability regarding work that, for a person of her background, is suitable.

It is with this reasoning that we disagree. True, previous commissions have followed this line of reasoning and adopted a flat-rule approach requiring availability for work during all hours that it is normally performed in their handling of cases of this nature, and the referee's conclusions of law are accurate in that regard. However, judicial precedent is abundant which admonishes administrative tribunals to refrain from applying any single hard and fast rule in determining whether or not a claimant is meeting the eligibility requirements of the law. Indeed, a factual, case-by-case approach was the intent of the Kentucky Court of Appeals in *Kentucky Unemployment Insurance Commission* v. *Henry Fischer Packing Company*, 259 SW 2d 436 [AA 235.25-17, BSSUI]

Counsel for claimant urges the commission to require that claimant be available only for all suitable work for which she does not have good cause to refuse, and successfully argues that it is fundamental that the statute be construed in its entire or, *in pari materia;* that the availablity section of the Kentucky Unemployment Insurance Law, KRS 341.350 (4), must be read in the context of its "suitability" and "good cause" provisions, KRS 341.100 (1) and KRS 341.370 (a).

This appeal, therefore, raises a basic question regarding our interpretation of the availability requirement which heretofore has not been addressed by this commission: whether an individual who restricts her hours of availability with "good cause" because of child care considerations is "unavailable for suitable work" so as to disqualify her for unemployment benefits.

There does not appear to be a general agreement as to whether refusal to be available for employment during certain hours because of family obligations should result in a denial of benefits. Some cases rule that under a given set of circumstances involving, as in this case, child care considerations, benefits should be allowed; other cases hold to the contrary, both with respect to child care and familial obligations. We have been unable to locate any case law in Kentucky dealing with this particular issue; however, the question has been addressed favorably in recent years by courts in other jurisdictions which we find to be persuasive.

First, a number of cases have considered whether statutes similar to ours require availability for work during all hours that it is performed. In both *St. Germain* v. *Adams*, 377 A.2d 620 (N.H. 1977) and *Carson* v. *Department of Economic Security*, 135 Vt. 312, 376 A.2d 355 (1977), the courts held that there must be a substantial and unqualified attachment to the labor market in order to meet the availability requirement; and that there must exist a reasonable likelihood that the claimant can obtain employment in spite of limited restrictions. We find these rulings to be consistent with the mandate set out by our own Court of Appeals in *Henry Fischer*, *supra:*

> To be available for suitable work within the meaning of KRS 341.350 (4), when considered in connection with KRS 341.350 (3) and KRS 341.100, we are of the opinion that an employee must be genuinely attached to the labor market, that he must be willing and ready to work, that he has the capacity to perform some type of work, although he may be unable to do his customary work, and that work within his power may be reasonably procured where he lives.

Although there is no limitation contained in the statute which would suggest that the legislature contemplated that a worker may be available for one shift and not the other, we believe that KRS 341.350 (4) does not require an availability without restrictions of any kind, but that this statute read in the light of *Henry Fischer* is designed to insure that claimants filing for benefits be available for work in such a manner that unequivocally attaches them to the labor market. Ergo, restrictions that unnecessarily impair the claimant's attachment to the labor market render such claimant unavailable for work.

Therefore, however cognizant of the well-established principle that a claimant may render herself unavailable for work by imposing conditions and limitations on employment availability, we must conclude that the bare existence of a self-imposed limitation on availability for work is not, of itself, sufficient to support a denial of benefits. The real inquiry is whether the claimant's self-imposed limitations effectively removed her from the local labor market.

The Supreme Court of California considered a case presenting a factual matrix similar to the instant one in *Sanchez* v. *Unemployment Insurance Appeals Board*, 569 P.2d 740 (1977). It should be noted that the doctrine of *Sanchez* is somewhat more sweeping than we are willing to embrace; however, we believe this case to be influential and cite portions of it here with approval.

Therein, a claimant in pursuit of restaurant work would not accept employment on either Saturdays or Sundays because on those days she cared for her 4-year-old son. The court rejected the flat-rule approach to availability, setting out a more flexible, case-by-case approach; and concluded that the referee, in applying a flat rule that a claimant must be available for the customary hours of her profession in spite of child care considerations, failed to consider whether or not the claimant might still be attached to a realistic labor market despite her restrictions on availability; and held that parental responsibilities would constitute good cause for restricting availability, even though such restriction might be significant, so long as the claimant remained available to a "substantial field of employment." The court said:

> The responsibilities our laws place on parents, and the importance to their children and society that those duties be discharged, mandate that the good cause concept not be defined so narrowly as to compel unemployed parents who remain available to a significant labor

> market to fulfill their parental responsibilities only upon pain of losing their unemployment benefits.

Similarly, *In Re Watson*, 161 S.E. 2d 1 (1968) [SW-450.154-19, BSSUI], the Supreme Court of North Carolina observed:

> It is difficult to imagine a better cause for rejection of employment in the late afternoon and evening than the responsibility of a mother for the care of a nine year old child who would otherwise be without supervision . . . The alarming increase in juvenile delinquency in recent years has made it abundantly clear that society, as well as the parent, has a very material interest in the supervision and care of children after their release from school.

There, too, the court rejected the contention that, to be eligible for benefits under the act, one must be available for work at any and all times. Although it did not attempt to formulate an all-embracing rule for determining what constitutes availability for work, the court adopted a pragmatic test. It pointed out that the claimant had worked many years on a particular shift and was actively seeking employment on that shift. This shift offered a majority of the jobs which were available in the community and which she was qualified to perform.

And finally, in *Tung-Sol Electric* v. *Board of Review*, 114 A.2d 285 (1955) [AA 450.4-31, BSSUI], a case so closely in point as to practically rule this case, the New Jersey Superior Court held that the claimant did not render herself ineligible for benefits when she limited her availability to a single shift (second) because she had to care for her three children during the day.

> Although recognizing that a claimant would have to have good cause for limitation, the court rejected the contention that whatever the circumstance, caring for children is a matter of personal convenience and does not amount to good cause. The court also refused to hold that claimants who limit their availability to a single shift must, after a reasonable time, so adjust their domestic obligations as to be available for employment for a greater part of the working day, but it did say that perhaps in some situations, as the time of unemployment lengthens and work prospects on the desired shift dim, the claimant should make more expensive (sic) arrangements or other adjustments for the care of her children. It cannot be maintained the court said, that a claimant who is absolutely compelled either to continue to limit her availability to the second shift after the lapse of a reasonable time or suffer her young children to fend for themselves must on that account lose her right to compensation (35 ALR3d 1129, 1143).

It is with this view that we agree most, and we adopt it fully here. In this case, the claimant established a work history on the first shift. Following involuntary separation from her most recent work, she was compelled to limit her search for new work to the first shift in order that she might fulfill her parental obligations and care for her children during the evening and late night hours. Although by limiting her availability to days, claimant has separated hereself from what may be construed as a significant portion of the labor market, we cannot find that such restriction is so unreasonable as to effectively *remove* her from the labor market. On the contrary, she limited her search for compelling, not capricious, reasons; and by increasing her work search to include employment in areas outside of that in which she last worked, she has shown a genuine attachment to the labor market as would be expected of a prudent worker in similar circumstances, and of sufficient nature to render her eligible for benefits.

The commission believes its responsibility as administrator of the Kentucky Unemployment Insurance Law requires periodic revisions of its policies in accordance with changing conditions. Recognizing that many households are now headed by single parents charged with the sole responsibility of caring for their children, we set forth that policy that an employee who has been separated involuntarily from his or her employment, who has established a work history on a single shift, and who is compelled to limit a search for work, or to reject tendered employment for "good cause" when the reason for such limitation would be deemed valid and not indicative of an unwillingness to work; such is not, of itself, sufficient to support a denial of benefits. As stated above, the real inquiry is whether the claimant's limitations are based upon sound and good cause, and whether there remains, despite limitations, a real and genuine attachment to the labor market. The award or denial of benefits must be based specifically on those grounds.

This order shall be considered precedential in all cases involving the same or a similar factual circumstances.

WHEREFORE, the commission, having reviewed the entire record and being advised, sets aside the decision of the referee and holds claimant available for work and eligible for benefits for all weeks properly claimed and for which she is otherwise eligible.

The full commission concurs.

WILLIAM L. HUFFMAN, *Chairman*
NORRIS L. ROBERTSON,
Associate Member
LEO F. NAHSTOLL,
Associate Member

Report 331-13
December 1980

Labor Dispute

LD 125.1-275

Montana A

Decision of Appeals Referee
October 28, 1980

No. 972-80

Determination of existence:
Closing of plant or lock-out

Labor dispute 125.1

Union members of an employer that sold and serviced heavy-duty trucks, rejected employer's last offer after a 3-year contract expired June 30, 1980. The union members had previously conducted negotiations with the employer's bargaining agent. The bargaining agent also represented three other businesses engaged in the same type of work who also were contract-negotiating with the union. Although negotiations were conducted simultaneously, the three businesses did not form a multibargaining unit for joint bargaining purposes; negotiations between employer and the union were separate from negotiations of the other businesses. On July 1 the union struck the three other businesses and established pickets at their premises. While in the past employer's employees had worked beyond expiration of the contract while negotations continued and were paid retroactively upon settlement, they were locked out on July 1. They had not struck employer and intended working as previously. On July 5 the union established informational pickets at employer's premises, indicating they had been locked out. Picketing continued until July 24, when an agreement was reached. Some employees returend on July 25 and 26; others when recalled later. But, on July 2, A, one of the claimants, was recalled and worked on July 3. He did not report thereafter until July 24 because of unwillingness to cross picket lines. *Held*, claimants, with exception of A, were not participants in the labor dispute but its victims, and they were unemployed without fault. A, however, although originally locked out, was recalled and worked 1 day, not doing so thereafter but participating in the labor dispute and being responsible for his unemployment.

Findings of Fact

The claimants, members of a trade union in Billings, Mont., hereafter referred to as the union, were employed by the employer, who sells and services heavy-duty trucks. The employer's 3-year labor contract expired June 30, 1980. Prior to that date, negotiations for a new contract had been conducted between the union and the employer's designated bargaining agent. A settlement had not been reached, and the Union members had voted to reject the employer's last offer.

The bargaining agent also represented three other businesses, which were engaged in the same type of work and who were also attempting to negotiate a contract with the union. While negotiating sessions for the three businesses were conducted simultaneously, the three businesses did not form a multibargaining unit for joint bargaining purposes. The negotiations between the union and the employer were separate and apart from the negotiations of the other businesses. Only July 1, 1980, the union struck the other three businesses with which it was negotiating and established pickets at their premises.

In the past, the employer's employees worked beyond the expiration of their contract while negotiations continued and were paid retroactively in accordance with the terms of the contract when finally negotiated. How-

Prepared by Employment and Training Administration

ever, on July 1, 1980, when the 10 union members reported for work they were advised they were locked out and were prevented from working. They had not voted to authorize a strike against the employer and intended to continue working while further negotiations were in progress. The claimants filed claims for benefits effective June 29, 1980.

On July 5, 1980, the union established informational pickets at the employer's premises. The legend on the sign stated that the employer had locked out the mechanics. The picketing continued until July 24, 1980, when the union and the employer negotiated a contract. Some of the employees returned to work on July 25 and 26, 1980, and the others returned when they were recalled.

From July 1, 1980, to July 24, 1980, only a minimum amount of work was performed in the employer's shop by the general manager and two other employees who worked in the shop on a limited basis. Sales of heavy-duty trucks and parts were severly reduced because customers were unwilling to cross the informational picket line to enter the employer's place of business.

On July 2, 1980, A, one of the claimants was recalled to work by the employer and worked on July 3, 1980. He did not report for work from July 3, 1980, until after July 24, 1980, because he was unwilling to cross the picket lines of the union at businesses where he was required to obtain parts. The employer testified that had the claimant discussed the matter with him, he would have been relieved of the duty which required him to enter businesses where a labor dispute was in progress.

The claimants received strike lockout benefits from the union in the amount of $20 per week. In order to receive that amount, they were required to perform picket duty when assigned.

Reason for Decision

Section 39-51-2305, Montana Unemployment Compensation Law provides:

> (1) Effective April 1, 1977, an individual shall be disqualified for benefits for any weeek with respect to which the Division finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the Division that:
>
> (a) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and
>
> (b) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute.
>
> (2) If in any case separate branches of work which are commonly conducted in separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purpose of this section be deemed to be a separate factory, establishment or other premises.
>
> (3) If the Division, upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state wherein the labor dispute occurs or of the United States pertaining to collective bargaining, hours, wages, or other conditions of work, such labor dispute shall not render the workers ineligible for benefits.

While the term "lockout" is not specifically defined in the Montana Unemployment Insurance Law, section 39-51-2304(3)(a) provides that benefits shall not be denied any otherwise eligible individual who refuses to accept new work "(a) if the position offered is vacant due directly to a strike, lockout, or other labor dispute". That section, by placing the word "lockout" in the same sentence immediately following the word "strike" and preceeding the words "other labor dispute" renders it evident that a lockout is a labor dispute.

The evidence shows that when the union members voted to reject the employer's last offer, a normal procedure in collective bargaining, the employer locked out the employees. As a result the employer's shop work force, work in the shop, as well as sales of trucks and parts, were substantially reduced. There was a stoppage of work at the employer's premises which resulted from a labor dispute.

However, the employees, with the exception of A, were not participants in the labor dispute, but rather were the victims of it and were out of work through no fault of their own. Therefore it is held that they were not subject to a disqualification under section 39-51-2305.

In regard to A, initially he was one of the locked out employees, but on July 2, 1980 was recalled to work and worked on July 3, 1980. He could have continued working had he so desired and his refusal to continue working contradicted his allegation that he was ready and willing to work but was prevented from doing so because of the employer's lockout. He made himself a participant in the labor dispute and was responsible for his own unemployment after July 3, 1980. He is subject to a disqualification under section 39-51-2305.

Decision:

The deputy's determination in regard to claimant A is *sustained*. He is disqualified to receive benefits from June 29, 1980, through July 26, 1980. The deputy's determination in regard to the other nine claimants is reversed. They were entitled to receive benefits from the effective date of their claims through July 26, 1980, in accordance with their claims, if they are otherwise eligible.

J. ROBERT CHILTON
APPEALS REFEREE

READEX FICHE

Washington B

Decision of Commissioner's Delegate
September 19, 1980

Nos. 0-05357
0-07181

Miscellaneous:
Claim and registration

Miscellaneous 75
Total and partial unemployment 20.05, 80.05, 455.15

The claimant was employed about 14 years and last worked as a fish filleter at $8.14 per hour. After a temporary layoff, when establishing her claim, she was advised that after she stopped mailing claim forms for any reason, to reopen a claim she had to report to her local office in person during the first week in which she filed. She was allowed waiting period credit for the week ending February 9 and was paid a total weekly benefit of $137 for the week ending February 16. She then returned to work. On February 29 she was disabled at work, underwent surgery on March 25 or 27, and was released for work April 21. She filed no claims for weeks ending February 23 through April 19. She worked April 21, was laid off for 3 days, and worked April 25, earning $122.92 for about 16 hours. She did not report to the local office April 26. She worked April 28 through April 30 and earned $196.68. She was told on April 30 that her employer could not pay the money she earned since April 21. On May 1 she visited her local office. Employer filed for bankruptcy, and it was unknown what claims would be paid. She was denied benefits for the week ending April 26 because of failure to report to her local office as advised, and for the week ending May 3 because she was "not unemployed." *Held*, entitled to benefits for the week ending April 26 as a "partially unemployed individual," special consideration as to claim filing and reporting being accorded such persons. However, she was not unemployed in the week ending May 3 because of services rendered and wages earned which, despite employer's default, were "payable" to her.

On July 2, 1980, the undersigned issued two orders taking two cause numbers under advisement. Because both cases involve the same claimant and involve the same hearing record, we have consolidated them for the purpose of our review and decision. Having now completed a thorough review of the record and files, thereby being fully advised in the premises, the undersigned hereby enters the following.

Findings of Fact

I

Petitioner worked for a fish company for approximately 14 years. Her last job with the company was that of fish filleter at a wage of $8.14 per hour.

II

Following a temporary layoff from the company on February 6, 1980, petitioner applied for unemployment insurance, and it was determined that she was eligible for a weekly benefit amount of $137.

III

At the time of her initial application for benefits, petitioner was given written instructions to the effect that "whenever you stop sending your claim forms for any reason such as return to work, vacation, illness, etc., you must report to the local office in person to reopen your claim during the first week for which you will want to claim benefits." (See Ex. #5.)

IV

Petitioner was allowed waiting period credit for the week ending February 9, 1980, and was paid benefits of $137 for the week ending February 16, 1980.

V

After the week ending February 16, 1980, petitioner returned to work for the company. On February 29, 1980, she suffered an injury to the tendon of her left thumb which rendered her unable to perform her work. Surgery was performed on her thumb on either March 25 or March 27, 1980. She was released as able to work as of April 21, 1980. In view of her work and her injury, she filed no claims for the weeks ending February 23 through April 19, 1980.

VI

Petitioner returned to work for the company on Monday, April 21, 1980, was then laid off for 3 days due to a lack of work, and worked again on Friday, April 25, 1980. She worked approximately 16 hours that week and earned wages of $122.92. Petitioner was normally employed well in excess of 16 hours per week. (See Ex. #8, Monetary Determination.) She did not report to the job service center during the week ending April 26, 1980.

VII

Petitioner again worked Monday, April 28, through Wednesday, April 30, 1980, and earned wages of $196.68. On April 30, 1980, she was informed by the company that it was unable to pay her the wages she had earned since April 21, 1980. Her employment with the company ended at this time. On May 1, 1980, petitioner visited the job service center.

VIII

Around the time petitioner's employment ended, a petition was filed in bankruptcy court with respect to the company. At the time of the hearing, it was unknown as to what part of petitioner's earnings would be paid in the bankruptcy proceedings.

IX

The job service center denied petitioner benefits for the week ending April 26, 1980, on the basis that she failed to carry out the written instructions of reporting to the office that week. It denied benefits for the week ending May 3, 1980, on the basis that petitioner was "not unemployed."

X

The appeal tribunal found good cause for petitioner's failure to report, and awarded petitioner benefits for both weeks without reduction with respect to her earnings.

Issues

I

READEX FICHE

Should the petitioner be denied benefits for the week ending April 26, 1980, on the basis that she failed without good cause to report to the job service center during that week?

II

What effect did petitioner's earnings during the weeks ending April 26 and May 3, 1980, have on her entitlement to benefits as to those two weeks?

Conclusions

I

We conclude that petitioner qualified as a "partially unemployed individual" during the week ending April 26, 1980, and that she was therefore not required to report to the job service center during that week.

In pertinent part RCW 50.20.010(1) provides:

> Benefit eligibility conditions. An unemployed individual shall be eligible to receive waiting period credits or benefits with respect to any week in his eligibility period only if the commissioner finds that
>
> (1) he has registered for work at, and thereafter has continued to report at, an employment office in accordance with such regulations as the commissioner may prescribe, except that the commissoner may by regulation waive or alter either or both of the requirements of this subdivision as to individuals attached to regular jobs . . . .

"Reporting" at an employment office during a spell of unemployment (i.e., personally appearing at such office) in accordance with regulations, is a condition that a claimant must meet in order to be later compensated for the unemployment that he currently endures. See *In re Davey*, Comm. Dec. (2nd) 225 (1976). As to the general "reporting" requirements for intrastate claimants, the appropriate regulation is WAC 192-12-141. Subsection (4)(a) thereof requires that they "report" during their waiting period week. Beyond that, their "reporting" requirements are simply those which the job service center advises them to follow. See WAC 129-12-141(7).

However, a class known as "partially unemployed individuals" is given special consideration under WAC 192-12-150. This was enacted pursuant to RCW 50.20.010(1) which says, as to registration and reporting requirements, the commissioner could "by regulation waive or alter either or both . . . as to individuals attached to regular jobs . . . ." See *In re St. Onge*, Comm. Dec. (2nd) 275 (1977).

A "partially unemployed individual" is defined as

> . . . one who during a particular week earned some [1] remuneration but less than his weekly benefit amount, was employed by his regular employer and worked less than his normal customary full hours for such regular employer because of lack of full time work. WAC 192-12-(150(1)(b).

As to the week ending April 26, 1980, petitioner clearly met the above description. See findings I and II.

WAC 192-12-150(4) describes the special consideration that is to be given a "partially unemployed individual." In pertinent part it states:

> An individual attached to a regular job may file a claim with respect to any week during the next succeeding four calendar weeks following receipt from the employer of information as to his earnings in any such week . . . .

---

[1] Under ch. 35, section 32, laws of 1945, one of the criteria for determining whether a claimant met the second definition of an "unemployed individual" was whether the remuneration payable to him with respect to the week was less than his weekly benefit amount. This criteria was changed by subsequent legislation. See ch. 7, section 1, laws of 1973, 2nd ex. sess. The regulation is currently being amended to reflect the subsequent statutory amendments.

> A partially unemployed applicant for benefits who is attached to a regular job shall not be required to register for work in any week with respect to which he is partially unemployed, and prior registration shall not be a condition precedent to the filing of a claim for benefits for partial unemployment . . . .

To require that a claimant report during his or her initial week of partial unemployment would frustrate the purposes of the above regulation. Under the predecessor of our current "reporting" regulation we held that a "partially unemployed individual" did not have a duty to report to the job service center during his or her week of partial unemployment. See *In re Newquist*, Comm. Dec. 836 (1970); and *In re Good*, Comm. Dec. 856 (1971). We conclude that the present claimant was under no duty to report during the week ending April 26, 1980, and that her failure to report does not serve as a basis for denying her claim.

II

RCW 50.04.310 and RCW 50.20.130, in material part, provide:

> RCW 50.04.310 . . . An individual shall be deemed to be "unemployed" . . . in any week of less than full time work, if the remuneration *payable* to him with respect to such week is less than one and one-third times his weekly benefit amount plus five dollars . . . (Emphasis added)
>
> RCW 50.20.130 . . . Each eligible individual who is unemployed in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less seventy-five percent of that part of the remuneration (if any) *payable* to him with respect to such week which is in excess of five dollars . . . . (Emphasis added.)

The issues of whether petitioner was "unemployed" during each of the 2 weeks, and whether anything should be deducted from each of her two claims, turn on the question of whether she had any remuneration "payable" to her with respect to each of the 2 weeks. In the ordinary use of the term, we conclude that she had remuneration of $122.92 and $196.68 "payable" to her with respect to the weeks ending April 26 and May 3, 1980. Black's Law Dictionary, Fifth Edition, defines "payable" as:

> Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may, therefore, signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once as opposed to "owing."

In the present case, petitioner's remuneration for the weeks ending April 26 and May 3, 1980, was fully earned, and represented an obligation that was immediately due and "legally enforceable." It is true that in bankruptcy the employer may be excused from paying all or part of the obligation, but we fail to see that this circumstance makes the remuneration any the less "payable."

Treating petitioner's remuneration as "payable" for purposes of RCW 50.04.310 and RCW 50.20.130 is consistent with the treatment that it receives for tax and wage credit purposes. For tax purposes, the employer is liable for contributions to the fund with respect to wages that are contractually due his employee even though the employer is unable to pay the wages. See RCW 50.24.015. Similarly, under RCW 50.04.030, an individual gets base year credit for hours of work in which he "earned" wages, and his entitlement to the credit is not made contingent upon the employer paying him the wages. Likewise, under RCW 50.20.120(2), a claimant's weekly benefit amount is calculated on the basis of his base year wages, and there is no requirement that he actually receive the wages.

Additionally, allowing petitioner to disregard her earnings under the circumstances of this case would create an anamolous situation in the application of RCW 50.04.310. Under the terms of the statute, one who performs full-time work during a given week cannot be regarded as "unemployed" regardless of the amount of earnings the individual has "payable" to him or her with respect to the week. Thus, an individual who worked full time during a week, as contrasted to petitioner who worked less than full time, could not qualify as "unemployed" even though the employer had defaulted in the payment of wages just as petitioner's employer had defaulted. Allowing claimants to disregard earnings in instances where the earnings were not paid due to the employer's insolvency, would create a rule that could benefit only those who worked less than full time during the particular week or weeks, and thus involve an illogical and inequitable application of the statute.

Petitioner's earnings of $122.92 during the week ending April 26, 1980, served to reduce her claim from $137 to $49, pursuant to RCW 50.20.130. Petitioner's earnings of $196.68 during the week ending May 3, 1980, exceeded one and one-third times her weekly plus $5, rendering her not "unemployed" within the meaning of RCW 50.04.310 and ineligible for benefits under RCW 50.20.010.

And now, in view of all the foregoing,

IT IS HEREBY ORDERED that the decisions of the appeal tribunal entered in this matter on the 23rd day of June, 1980, shall be *modified*. Petitioner is *not* subject to a denial of benefits under RCW 50.20.010(1) as to the week ending April 26, 1980. Pursuant to RCW 50.20.130 petitioner's benefits for the week ending April 26,1980, are reduced to $49. As to the week ending May 3, 1980, petitioner was not "unemployed" within the meaning of RCW 50.04.310 and pursuant to RCW 50.20.010 she is denied benefits.

DAVID F. FREEMAN
COMMISSIONER'S DELEGATE

READEX FICHE

Alaska B

Decision of Commissioner No. 80H-123
July 21, 1980

Misrepresentation:
Overpayments or restitution

Miscellaneous 340.2
Procedure 195

The claimant, notified that waiver of overpayment was not possible because benefits had been secured by fraud, misrepresentation, or misstatement, appealed. The referee's conclusion, however, was based on a section of the law that had been repealed and reenacted with provisions defining "good faith" and setting out guidelines concerning the factor of hardship in recovery of overpayments. Also, a subsequent statute (enacted prior to claimant's hearing) declared that liability for repayment of overpayment could be waived under any of three possible circumstances. *Held*, reversed and remanded for a new hearing and decision since claimant had been denied due process of law.

Findings of Fact and Reasoning

On June 30, 1930, Mr. A requested that I review a decision issued in this matter on June 20, 1980, by the Employment Security Division appeal tribunal. Therein, the agency's notice of determination holding Mr. A liable for benefits received but to which he was not entitled was upheld. Having reviewed this matter, I find sufficient error in the proceeding to warrant ruling that Mr. A was denied due process and hereby remand this matter to the tribunal for a new hearing.

In the hearing held on Mr. A's behalf on June 12, 1980, Mr. A was advised by the referee before whom the hearing was held that he was not entitled to a waiver of liability as he had received the benefits in question due to fraud, misrepresentation, or misstatement on his part. In stating such, the referee relied upon Alaska Administrative Code chapter 8, paragraph 85.220 as enacted on October 25, 1978. However, the particular provision was repealed and reenacted effective December 14, 1979, setting forth a definition of the term "good faith" and guidelines for the determination of great hardship in the recovery of an overpayment.

Alaska Statute 23.20.390(b) (as enacted March 13, 1980) specifies that the department *may* absolve an individual from liability for repayment under one of three conditions: (1) the individual has died; or (2) he has acted in good faith in claiming and receiving benefits; or (3) great hardship would result from charging the individual with repayment of the benefits. Neither the statute nor the regulation specifies that an individual who has received benefits through fraudulent means may not receive the waiver. (However, I specifically note the use of the word "may" (as emphasised by me above) in the statute.) Further, the overpayment involved in this matter did not result from any fraudulent filing by Mr. A.

As the statute allows for the waiver under any one of three circumstances, each one of those circumstances must be decided upon in a decision regarding whether or not the individual should receive absolution from liability.

Accordingly, I remand the matter to the tribunal for a new hearing and a

subsequent decision on the matter of Mr. A's liability to the fund.
SO ORDERED.

ALASKA DEPARTMENT OF LABOR
EDMUND N. ORBECK
COMMISSIONER

READEX
FICHE

Washington A

[Affirmed, September 19, 1980, Commissioner's Delegate, decision No. 0-07107, unpublished.]

Decision of Appeal Examiner
July 7, 1980

No. 0-07107

Absence:
Notice

Misconduct 15.1
Voluntary leaving 135.1

A school custodian, absent from work without notifying employer, used her mother as a substitute on at least three occasions. Her mother worked the entire day each time. Although she was scheduled to work during a certain period, Monday through Friday, claimant failed to do so in order to pursue personal business elsewhere. Her mother filled in for her. Her supervisor, while aware that claimant's mother was working on her behalf, did not know the length of claimant's absence. *Held*, reversed and claimant eligible for benefits since employer had previously acquiesced in similar conduct by claimant. While normally the substitution of her mother during an absence was neither proper replacement nor notice, employer was aware without objection of such occurrence in the past. Thus, claimant could have gained the impression that it was proper for her to be absent so long as she secured her mother as replacement. Although such substitution for four days showed poor judgment, poor judgment is not misconduct.

Findings of Fact

At the time the claimant opened her claim, she was last employed as a custodian from March 1979 until the latter part of April 1980 with a school district. At the date of claimant's separation, she was working fulltime and earning $1,200 a month. Claimant was satisfied with her wages, hours, and working conditions.

Prior to claimant's job separation, she sometimes had her mother report to work and work on her behalf. This happened on at least three occasions, and her mother worked an entire day on behalf of claimant. When her mother replaced claimant, claimant did not notify the school district or report for work. Claimant believed that it was proper for her mother to work on her behalf.

Claimant was scheduled to work on Monday, April 21, through Friday, April 25, 1980. However, claimant had personal business in Seattle, Wash., and failed to report for work April 21 through April 24, 1980. Nevertheless, claimant's mother reported for work on each of these days and performed claimant's work. Claimant's supervisor was not aware as to the length of claimant's absence and was aware only that claimant's mother was working on her behalf.

When claimant reported for work Friday, April 25, she was discharged for failing to show up for work or notify the school district for failing to do so.

Prior to claimant's mother working 4 days during claimant's last week of employment, she had worked for only 1 day when claimant failed to report for work.

READEX FICHE

Conclusions of Law

The provisions of RCW 50.20.050 (section 4, chapter 33, laws of 1977, 1st ex. sess.) and WAC 192-16-007 through WAC 192-16-017 are applicable and will be found on the attachment. An indefinite period of disqualification is imposed denying benefits to an individual who leaves work voluntarily without "good cause."

Since claimant was discharged and did not voluntarily quit, the disqualification pursuant to RCW 50.20.050(1) is not applicable.

The provisions of RCW 50.20.060 (section 5, chapter 33, laws of 1977, 1st ex. sess.) and WAC 192-16-017 are applicable and will be found on the attachment, together with an excerpt from the Wisconsin Supreme Court case, *Boynton Cab Co.* v. *Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941) [V4-8, 201, BSSUI], which sets forth a definition of the term "misconduct" which is applicable to the Washington statute. *Boynton* was approved by *Willard* v. *ESD*, 10 Wn.App. 437, 517 P.2d 973 (1974).

At the outset the tribunal points out that, absent a collective bargaining agreement or statutory proscription, an employer has the virtually unqualified right to fire an employee when he pleases and for what reasons he pleases. Thus, this decision in no way questions whether the decision to discharge wa wise or unwise, justified or unjustified. The mere fact that an employer has deemed it expedient, desirable, or necessary to discharge an employee does not conclusively prove that the action or inactions of the employee which lead to the discharge constituted willful or wanton misconduct. Misconduct must be established by the preponderance of the evidence and the party alleging the existence of misconduct has the duty of establishing same.

Claimant was discharged for failure to report and failure to notify her supervisor of her absence from work on April 21 through April 24, 1980. The standard principle has been uniformly stated that an employee who unjustifiably fails to report for work or fails to notify his employer that he is not showing up for work commits misconduct pursuant to the Employment Security Act. However, in the present case, claimant sent her mother to work on her behalf. Normally, this would not be a proper replacement and constitute proper notice to the employer. In the present case, however, the claimant had in the past sent her mother to replace her when she was, for any reason, unable to work. The appearance of claimant's mother was considered a proper replacement and the interested employer acquiesced in such conduct. The testimony of the school's witness stated that claimant might have been given the impression that it was proper for claimant to not show up for work or notify the employer if she sent her mother to replace her. Although in the past claimant had only sent her mother on a 1-day basis, nevertheless, this might have given the impression to claimant that it was proper even on a 4-day basis. Although the undersigned considers it poor judgment on claimant's part to have her mother replace her on 4 consecutive days, nevertheless, poor judgment does not amount to misconduct pursuant to the Employment Security Act. In evaluating all the evidence, this tribunal is of the opinion that claimant probably believed justifiably that it was proper for her mother to replce her and she was not required to notify the employer of her failure to report for work whenever her mother did replace her.

Decision

The determination under appeal is *set aside*. The claimant is not subject to disqualification pursuant to RCW 50.20.050 or RCW 50.20.060.

DAVID J. DELAITTRE
APPEAL EXAMINER

Wisconsin B

Decision of Review Commission No. 79-A-65825 MW
November 24, 1980

Attitude toward employer:
Competing or aiding competitor

Misconduct 45.15

A shop superintendent had worked 3 years for a manufacturer of industrial vacuum cleaning equipment in Milwaukee, Wis. The shop superintendent and the firm's purchasing agent informed the company president in March 1979 that they had purchased one of the employer's industrial vacuum cleaning units and planned to engage in the business of leasing this unit to businesses in northern Wisconsin and the upper peninsula of Michigan. The employer had no objection to the plan if the operation did not conflict with his own and activities were confined to the geographic area specified. However, in September 1979 he learned that claimant was active in the Detroit vicinity. He further learned that claimant had hired a person who represented employer in this area and the representative had contacted the employer's largest customer in behalf of the claimant's business. He further learned that the claimant was soliciting contracts and was considering engaging in the manufacture of industrial vacuum cleaning equipment. Both employees were discharged for breaching the March 1979 agreement. The employer also learned that both had started a second business — providing industrial cleaning services. *Held*, discharged for misconduct connected with work since claimant was engaged in activities detrimental to employer's interests and was doing so without employer's knowledge and consent. The potential for conflict in situations where the equipment could either be purchased or leased was real; thus, an actual loss of business due to the pressure of competition did not have to be proved.

Findings of Fact and Conclusions of Law

The employee worked for more than three years as shop superintendent for the employer, a manufacturer of industrial vacuum cleaning equipment. He last worked for the employer on September 28, 1979 (week 39) when he was discharged. He then became unemployed, registered for work at a public employment office, and filed claim for unemployment benefits.

The employer contested the employer's eligibility for such benefits, contending that his discharge was in effect for misconduct connected with his employment and specifically because he had engaged in a competing business.

In March 1979 the employee and a coworker, the employer's purchasing agent, informed the president of the employing corporation that they had purchased one of the employer's industrial vacuum cleaning units and planned to engage in the business of leasing this unit to foundries and other businesses in northern Wisconsin and the upper peninsula of Michigan. The president indicated that the employer would have no objection if they did not engage in business in conflict with the business of the employer and confined their activities to that geographic area. In September 1979 it came to the employer's attention that the employee's business was active in the vicinity of Detroit, Mich. The employer also learned that the employee's business had engaged the services of a worker for a manufacturer's representative in the Detroit area who also represented the employer and that this worker had contacted the employer's largest customer in behalf of the employee's business. It also came to the employer's attention that the employee's business was soliciting industrial cleaning contracts and was considering engaging also in the manufacture of industrial vacuum cleaning equipment.

The employer subsequently discharged the employee and the coworker because of what the employer considered to be a breach of the original understanding concerning the approval given to the employee's business activities in March 1979. Prior to a conference on the day of the employee's discharge, neither the employee nor the coworker had informed the employer of the extension of their business activities into the lower peninsula of Michigan or of their engaging the services of a worker for the employer's manufacturer's representative in that area. That worker has also become a chief operating officer for a second business operated by the employee and the coworker for providing industrial cleaning services to various customers; the employer had not been informed of this second business or of the worker for the manufacturer's representative's role in it.

While the employer was not at that time actively engaged in the business of providing industrial cleaning services, the employer regarded that as a lucrative field and considered eventually entering that field. The employee's business was engaged in activities beyond the scope of leasing equipment and had extended its operations geographically beyond the limits set by the employer when giving his original approval in March 1979 based on the representations of the employee and coworker that their business activities would be limited to leasing and confined to a specific geographic area.

The commission has concluded that the geographic limitations placed on the operation of the employee's business by the employer's president were specified out of concern for the employer's future business activities. Under the circumstances of this case the commission has concluded that the employee and his coworker were engaged in activities detrimental to the employer's interests and that such activities were undertaken without the employer's knowledge and consent. His discharge for this reason was for conduct which evinced an intentional and substantial disregard of the employer's interests in preserving the employer's future options and in preventing its workers from using knowledge and skills gained while working for the employer to build a potentially competing enterprise in an unauthorized area. In the view of the commission the employer had a right to be informed of such activities while the employment relationship continued so that the employer could express consent or disapproval.

The commission therefore finds that the employee was discharged in week 39 of 1979 for misconduct connected with his employment within the meaning of section 108.04(5) of the statutes.

The Commission further finds that the employee was paid benefits in the amount $5,963 for weeks 42 through 52 of 1979, week 1 of 1980, and weeks 2 through 28 of 1980 for which he was not eligible and to which he was not entitled within the meaning of section 108.03(1) of the statutes, and that, pursuant to section 108.22(8)(a) of the statutes, he is required to repay such sum of the Unemployment Reserve Fund.

Decision

The decision of the appeal tribunal is *reversed*. Accordingly, benefits are denied based on employment for the employer and the employee is ineligible for benefits based on other previous employment in weeks 39 through 42 of 1979. He is required to repay the sum of $5,960 to the Unemployment Reserve Fund. The monetary determination UC-30 dated February 8, 1980, is hereby set aside.

VIRGINIA B. HART, *Chairman*
LAVERNE G. AUSMAN,
Commissioner

NOTE: In making its findings and conclusions, the commission has attached great weight to the testimony concerning the geographical limits of the employer's approval for the operations of the employee's business, particularly in view of the close relationship between the selling and leasing of equipment and the conflict which could easily arise when a potential customer might weigh the relative advantages of owning or leasing such equipment. The commission regards the potential for such conflict as the crucial factor and does not require that an actual loss of business due to the pressure of competition be proven. The commissoin had no reason to disbelieve the testimony of one of the employer's welders and assemblers, who was hired by the employee's business for temporary work during his free time, to the effect that he had been cautioned by the employee's coworker not to reveal the presence of some of the employee's equipment at the plant of the employer's largest single customer. The commission inferred from this testimony that the employee was aware of a potential conflict. The commission was convinced that the employee was personally aware of the location of this equipment in the customer's plant and of the fact that this was in violation of the approval given by the employer. The commission concluded that he had taken concrete steps to compete with the employer and that such action evinced an intentional and substantial disregard of the employer's interests.

READEX FICHE

Alaska

SUPERIOR COURT
THIRD JUDICIAL DISTRICT

August 1, 1980

DANIEL P. BIBLE *v.* STATE OF ALASKA, COMMISSIONER OF LABOR

Evidence:
Weight and sufficiency

Misconduct 190.15
Procedure 190, 430.2

A night stocker for a grocery chain was discharged for sleeping on the job. He appealed on the grounds that employer's appeal from the referee to the commissioner was untimely because the appeal had not been served on claimant and was not supported by substantial evidence. He also claimed the commissioner erred in relying on heresay evidence, an affidavit. *Held*, the timeliness factor was dismissed, since it had been previously waived because it was raised for the first time, and not before, in the appeal reply brief. It had not been raised before the commissioner after receipt of his decision and before appeal to court. The other two issues were combined as being interrelated and hearsay evidence, if relevant, deemed sufficient to sustain a finding unless objection had been raised. (It had not.) Claimant contended that a regulation precluded objection, the contrary, however, concluded in interpreting the regulation, which, also, otherwise protected claimant's right to cross-examine witnesses, i.e., would have justified objection to reception of the affidavit. In any event, it was doubtful that the commissioner had relied solely on the affidavit, but, instead, had merely used it to supplement available *direct* evidence relative to claimant's activities that night.

Order and Decision on Appeal

This is an appeal from a decision of the commissioner of labor denying appellant certain benefits under the Unemployment Compensation Act. Appellant raises four issues on appeal: (1) whether the appeal to the commissioner of labor was timely, (2) whether the commissioner of labor's decision was supported by substantial evidence, and (3) whether the Commissioner erred in relying in part upon hearsay evidence, i.e., an affidavit of a coworker, Mr. Rivera. These issues will be discussed in turn.

Appellant first complains that the "appeal" from the referee to the commissioner was not served on appellant and was not timely. This issue was raised for the first time in appellant's reply brief. There is nothing in the record that would indicate that appellant raised this issue before the commissioner after receipt of the commissioner's decision, but prior to filing this appeal. Consequently it would appear that this objection is waived.

The remaining issues are interrelated. First, appellant contends that the commissioner's decision is not supported by substantial evidence, absent the hearsay affidavit of Mr. Rivera. Second, that to the extent that the commissioner relied on Mr. Rivera's affidavit, he relied on impermissible hearsay; and third, that to the extent that the commissioner could properly rely on Mr. Rivera's affidavit, appellant was denied his constitutional right to cross-examination. In order to consider these issues in context, it is necessary to briefly describe the procedures below. Mr. Bible, an employee of Safeway Stores, Inc., was terminated on April 27, 1978. He sought immediate unemployment compensation from the State pursuant to statute. His employer, Safeway Stores, contested his application alleging that he had been fired for

READEX FICHE

Wyoming A

Decision of Appeals Examiner
September 5, 1980

No. 7529-AT-80

Evidence:
Weight and sufficiency

Misconduct 140.3, 190.15.

According to the employer, a Spanish-speaking laborer was ordered by his foreman to drive to the company yard in the employer's pickup truck to work. The next day the foreman, noticing damages to the vehicle, asked the laborer if there was anything he wanted to say as to what had happened. The laborer attended the hearing with an interpreter because of purported but disputed limited understanding of English. According to employer, he responded in the negative but that later that day stated that since he had been treated well by the foreman and respected him, he had in reality "lost his head" in the yard and had taken two sheets of plywood. Accordingly he was discharged. But, at the hearing, claimant denied such occurrence had taken place, explaining his confession was prompted by the foreman's agitation, misunderstanding of the question, and confusion. He also contended that he actually told the foreman he had been *tempted* to take the plywood, but, said he took the plywood only in an effort to engage him in conversation to ease the tension. Employer admitted there was no evidence of such appropriation. *Held*, disqualification reversed for, although claimant's rationale of his actions was not entirely logical, no evidence otherwise existed of plywood theft. Further, regardless of extent, a language barrier *was* present.

Findings and Conclusions

The claimant was employed as a laborer by a company at Mills, Wyo., from March 24, 1980, to May 30, 1980, at which time he was discharged by the employer.

The employer testified that early in the last week of the claimant's employment, the claimant was instructed by his foreman to take the foreman's company pickup truck to the employer's yard to perform certain duties. The next day, the foreman noticed that his truck had sustained damages. The foreman called the claimant aside and asked the claimant, "Candy, is there something you want to tell me that happened when you were at the yard yesterday?" The employer testified that the claimant replied that there was nothing to tell, but then later that day, the claimant approached the foreman and stated that the foreman had always treated him well and that he respected the foreman and that he had lost his head and while at the yard he took two sheets of plywood for his own use. After consultation with the general superintendent, the foreman was instructed to discharge the claimant.

The claimant testified that he did not actually take any plywood. The claimant stated that he could tell that the foreman was upset and did not fully understand the foreman's question and was confused. The claimant stated that he actually told the foreman that he only had been tempted to take the plywood in an attempt to engage the foreman in conversation to relieve the tension.

The employer testified that there was no other evidence to indicate that the claimant had taken plywood for his personal use from the employer's yard other than the conversation between the claimant and his foreman.

The claimant is a Spanish-speaking person with a permanent visa. The employer stated that the claimant understands English very well. The claim-

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ant stated that he understands English only well enough to accept short commands in a work environment, but does not understand English well enough to conduct a conversation.

While the claimant's reason for mentioning a desire to take plywood from the employer's yard is not entirely logical, there is no evidence of record to indicate that any plywood was actually removed from the employer's property by the claimant other than the foreman's understanding of their conversation. Whether great or small, a language barrier does exist.

Evidence of record is insufficient to establish that the claimant was discharged for misconduct connected with his work and he is, therefore, not subject to disqualification.

Decision

The deputy's redetermination disqualifying the claimant for benefits effective June 1, 1980, on the grounds that he was discharged from his most recent employment for misconduct connected with his work is hereby reversed, as is the accompanying forfeiture of benefit credits.

THEODORE D. MARAS
Appeals Examiner

Pennsylvania B

Decision of Board of Review
October 23, 1980

No. B-188969

Relations with fellow employees:
Annoyance of fellow employee

Misconduct 390.25

The claimant was an assistant to the manager of a chain restaurant. Following a series of shortages in the cash register, the last one of $50, claimant was ordered by the manager to search the waitresses. She complied, ordering them to remove their shoes, socks, and scarves in a bathroom. One waitress, angered by the search, removed all her clothes. The money was not found. The regional vice-president of the chain discharged both claimant and the manager. *Held*, discharged for misconduct connected with her work since claimant and the manager used their apparent authority to demean the waitresses. The search violated the waitresses' human dignity and, thus, was in wanton disregard of the employer's interests.

Findings of Fact

1. The claimant was last employed as an assistant to the manager by a chain restaurant from August 28, 1979, until December 29, 1979. Her final monthly salary was $550.
2. The manager of the restaurant at which claimant worked discovered a shortage of $50 in the cash register. There had recently been a series of shortages in the cash register.
3. The manager, after speaking with the local police department, chose to conduct a search of the waitresses for the missing money.
4. The manager had no authority to conduct such a search.
5. The manager ordered the claimant to search the waitresses.
6. Claimant complied and requested the waitresses to remove their shoes, socks, and scarves. This was done in a bathroom.
7. One waitress became enraged by the search and removed all her clothes, including her feminine napkin.
8. The missing money was not found in this search.
9. The regional vice-president of the restaurant chain learned of the search and discharged both the claimant and her manager for their participation in the search, on December 29, 1979.

Discussion

The Office of Employment Security issued a determination denying benefits to the claimant under section 402(e). The claimant filed an appeal therefrom, and following two hearings, one at which the claimant, her former manager, and an Office of Employment Security representative appeared and testified and one in Massachusetts, at which the employer representatives, assisted by a tax consultant, appeared and testified, the referee issued a decision reversing the office's determination. Thereafter, the employer filed a further appeal from the referee's decision.

Section 402(e) of the law provides that a claimant shall be ineligible for compensation for any week in which her unemployment is due to her discharge or temporary suspension from work for willful misconduct connected with her work. While the term "willful misconduct" is not defined in the

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law, the board of review and the appellate courts in numerous decisions have defined willful misconduct as an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer.

In this case, claimant partook in a search of the employer's waitresses. Claimant and her manager used their apparent authority to cause the waitresses to remove clothing and thereby demean themselves. Such a search violates the human dignity of the waitresses and is a wanton disregard of the employer's interests.

Claimant should have refused to participate in this search, especially when one of the waitresses began to remove her clothes. Therefore, claimant's conduct in this search constitutes willful misconduct in connection with her work.

Conclusion of Law

The claimant is ineligible for benefits under the provisions of section 402(e) of the Pennsylvania Unemployment Compensation Law.

Order

The decision of the referee is reversed and benefits are denied.

UNEMPLOYMENT
COMPENSATION
BOARD OF REVIEW

MAURICE ABRAMS, *Chairman*
JOSEPH J. MCANENY, *Member*
JAMES P. BRESLIN, *Member*

Washington B

Decision of Commissioner's Delegate
September 19, 1980

No. 0-04625

Violation of company rule:
Assaulting fellow employee

Misconduct 485.15

A toolmaker for an airplane manufacturer, which also employed his wife, was discharged for fighting on company property. Several months earlier, his wife had been sexually harassed by another employee. The unsolicited sexual overtures changed to hostility and physical assault. To alleviate the situation, claimant's wife had shifted her work station elsewhere from the employee. However, even there he would stare at her for long periods. He guided a 200-pound cart down her aisle, forcing her to move, because contact was made. She discussed the problem with her supervisor and her husband. Others also had had problems with the employee. After 4 months of unsuccessful efforts to resolve the matter, an incident occurred which caused her to leave the premises in tears. It was apparent that appealing to management would be fruitless. As a result, claimant decided to confront the employee prior to his scheduled shift. He deliberately chose an area near the general superintendent's office for "peaceful" reasons. According to claimant (the employee did not respond to claimant's subpoena to attend the hearing) the employee was defiant, cursed him, and provoked a fight in the area instead of off the premises as claimant had suggested. *Held*, not separated for fault since, under the circumstances present, misconduct was not present, nor was he the "provoker."

The claimant, having duly petitioned the commissioner for a review of a decision of an appeal tribunal entered in this matter on May 7, 1980, and the undersigned, having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby adopt the findings of fact (below) and conclusions (later) Nos. 1 and 2 of the appeal tribunal's decision subject to additional findings of fact and conclusions.

Findings of Fact

1. Effective February 15, 1980, the claimant was discharged from his employment as a toolmaker for an airplane manufacturing company. The claimant had been employed since October 2, 1978. The claimant's wife was also an employee of the same company.

2. The claimant was discharged for fighting on company property in violation of company rules, which were known to the claimant. The claimant admits to fighting on company property but cites mitigating factors as set forth below.

3. The fight in question occurred on February 8, 1980. Some 4 months prior to this time the claimant's wife began experiencing problems with another employee, Mr. A. What began as unsolicited sexual overtures changed to hostility and physical assault. The claimant's wife took these matters to her immediate supervisor. Apparently, other individuals had had problems with Mr. A as well. After 4 months of attempting unsuccessfully to deal with this problem, an incident occurred which caused the claimant's wife to leave the premises in tears. The claimant then decided that it was necessary to have a confrontation with Mr. A, and he attempted to do it on the day in question.

4. Just prior to his scheduled shift on February 8, 1980, the claimant con-

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fronted Mr. A in an area near the general superintendent's office. The claimant recalls the conversation as follows:

> Tom: Are you Tyrone?
>
> Tyrone: Yes.
>
> Tom: Tyrone, if you are looking for an argument or a fight, you happen to be picking on the right woman. Now I want it stopped.
>
> Tyrone: Now wait a minute, what's going on?
>
> Tom: You have been picking on my wife and it is going to stop. You have propositioned her, treated her like crap, and last night you told her you were going to stomp her face in. [While this was being said I pointed my wife out to him.]
>
> Tyrone: Hey, man, what I say to your wife ain't none of your #*& business.
>
> Tom: Tyrone, I am telling you one time if you ever bother my wife again I am going to personally tear your head off. Now leave her alone.
>
> Tyrone: Hey, man, you shouldn't be coming in here all mad at people like this.
>
> Tom: I understand that, but no one under no circumstances threatens to kick my wife's face in. (At this point Tyrone took off his jacket and hat and threw it on the table and while he was walking around to the right side of me, he said, "Hey, man, if you want to fight we'll do it right here and right now.)
>
> Tom: Tyrone, if we do it right here we are going to be out the gate, otherwise fired. Let's take it outside the parking lot.
>
> Tyrone: No, man, hit me. If you want to fight me do it here and do it now.
>
> [At this point Tyrone was to my right in fighting stance with his left hand clenched shut into a fist. He kept saying you want to do it now].

5. Following this dialogue, the claimant struck Mr. A one or more times and a scuffle ensued. Mr. A and another individual attempted to hold the claimant on the floor and kick him in the head but were prevented from doing so by another employee. We find the claimant's recitation of facts to be credible. Although the employer subpoenaed Mr. A to attend the claimant's hearing, Mr. A failed to comply with this subpoena, apparently due to a conflict with his recently found employment. Due to the nature of this decision, we choose not to seek enforcement of the employer's subpoena."

Additional Findings of Fact

I

The petitioner's wife was initially harassed by Mr. A's vulgar, insulting, explicit sexual remarks and overtures. These increased to the point of happening in front of others. She attempted to rebuff and ignore it. She told Mr. A to quit or she would go to the supervisor. She shifted to the other side of the shop and the person ceased for a while. He resumed by different harassment. He guided a 200-pound cart down the aisle and forced her to move. It nudged her once. He stared at her for long periods. She complained to her lead person who did nothing. The final incident was on February 7, when she tripped on a hose. Mr. A told her that he would (or would like to) stomp her face. She again complained to her lead lady who advised her that she had her own problems with the person and that she (lead) could do nothing. (Hearsay has it that he had hit the lead person in the face with a hose.) The lead advised her that she had gone to management, who shifted her to another area for her trouble, and had done nothing known or observable to Mr. A. The lead indicated that the wife could go to management with little indicated result or have the wife's husband look into it. The wife was in trifle awe of management anyway and did not want to (or feared to make) trouble for Mr. A.

II

At about midnight on May 7, the petitioner found his wife crying when he came over to her building to bring her home. She would not tell him of the "stomp your face" incident and the lead's reaction until they were part way home. It was far too late and not feasible or possible to attempt to contact Mr. A that night. The petitioner felt it to be unwise to go to Mr. A's home at any time, even if he knew where he lived, which he did not. He did not know him by sight, and the record is unclear whether or not he knew his last name. He did not want to get any of them in trouble. He had no previous disciplinary actions.

III

The petitioner resolved to go to work early on February 8 to contact Mr. A and straighten out the matter. He deliberately selected a spot in front of the general superintendent's office and could see the general superintendent through the window. He felt this would belay any possible adverse reactions on the part of Mr. A and that he (the petitioner) could have recourse to the superintendent in the improbable (in his opinion) case of things getting out of hand. He was taken aback at the words, ". . . what I say to your wife ain't none of your [scurrilous indecent hyphenated word] business." (The word is used repeatedly in the record and cannot be misidentified.) Mr. A then started using the word repeatedly to describe the petitioner. Again the petitioner was taken aback. Mr. A threw off his coat, "came around to me," "moved to the right of me" (stance, or side winder?), at a distance of 1½ or 2 feet, with clenched fists, and repeatedly taunted: "[Expletive deleted], if you are going to do it, do it now." The petitioner demurred to the effect that if they fought there, it would be "out the gate." The taunts and epithets continued. In the words of the petitioner: "I blew up. I hit him . . . . I was so mad the last time he said that, there was no right or wrong."

From the foregoing findings of fact, the undersigned frames the following.

Issue

Was the petitioner discharged under RCW 50.20.060 for misconduct connected with the work?

From the issue as framed, the undersigned draws the following:

Conclusions

We concur with the appeal tribunal's conclusions Nos. 1 and 2 and citations*, including the Washington case law criteria for misconduct appended to the appeal tribunal's decision. (Which were as follows:)*

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1. The provisions of RCW 50.20.060 (section 5, ch. 33, laws of 1977, 1st ex. sess.) and WAC 192-16-017 are applicable and will be found on the attachment, together with an excerpt from the Wisconsin Supreme Court case, *Boynton Cab Co.* v. *Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941), [V4-8, 201, BSSUI] which sets forth a definition of the term "misconduct" which is applicable to the Washington statute. *Boynton* was approved by *Willard* v. *ESD*, 10 WN App. 437, 517 P.2d 973 (1974).

2. At the outset the tribunal points out that, absent a collective bargaining agreement or statutory proscription, an employer has the virtually unqualified right to fire an employee when he pleases and for what reasons he pleases. Thus, this decision in no way questions whether the decision to discharge was wise or unwise, justified or unjustified. The mere fact that an employ-

er has deemed it expedient, desirable, or necessary to discharge an employee does not conclusively prove that the actions or inactions of the employee which led to the discharge constituted willful or wanton misconduct. Misconduct must be established by the preponderance of the evidence and the party alleging the existence of misconduct has the duty of establishing same.

II

Violation of a reasonable rule may be misconduct. A rule or policy against fighting on company property is reasonable. Actually, under appropriate circumstances a fight on company property might be misconduct without a rule. There is a thin line of exceptions to the above. Where an individual is "provoked" and the action is "reflex in nature" and "was such as would incite an average person in the same situation," he or she may be absolved from what otherwise might be misconduct. Thus, where an employee struck his foreman due to a scurrilous epithet which provoked the reaction, it was held not misconduct. *In re Clark*, Comm. Dec. 697 (1967); *In re Francis*, Comm. Dec. (2nd) 252 (1976). The cases are few. They should be thoroughly explored as to all the facts and circumstances. Each stands on its own.

III

In the instant case we consider the background of a bad situation which had to be resolved. We find no premeditation, intent, or desire on petitioner's part to start a fight. Nor did he have real anticipation that the person would react as he did. Nevertheless, out of precaution he selected a location which he felt would preclude the matter getting out of hand, If it did get out of hand he would have access to a supervisor. He did not want to get any of them in trouble, but wanted to talk it out. He was taken aback by the fellow's brazen effrontery and scurrilous epithets; yet he refused to fight on the premises. However, the repeated insulting degrading word about a foot from his face suddenly snapped his coolness. He reacted blindly. He was provoked as many a person might be. We do not believe the result to be "misconduct" within the meaning of the act.. Nor was he the "provoker." *In re Hayes*, Comm. Dec. 920 (1972).

IV

We considered all of the able arguments of the employer, and none persuades us. We touch on some arguments in reply. It was not appropriate or feasible to attempt to resolve the matter on the night of February 7. It certainly was the better part of valor or discretion not to go to the fellow's home day or night at any time if he knew the address, which he did not. As to phoning, aside from the efficacy, it is not clear that he knew the last name or spelling. The petitioner felt that the fight location would act as a deterrent if one was needed. We think petitioner's actions were reasonable and were one reasonable way of attempting to resolve a bad situation. We grant that another avenue would have been to complain to the wife's superior. The wife might have been expected to do that, but she has explained why she did not. This may have influenced the petitioner, too, but in any event he did not want to make trouble for anyone. One of the first questions a superior might well ask petitioner in such a situation was, "Have you discussed it with the party?" Now, therefore,

IT IS HEREBY ORDERED that the decision of the appeal tribunal entered in this matter on the 7th day of May, 1980, shall be set aside. The petitioner is not disqualified under RCW 50.20.060. He is entitled to benefits if otherwise qualified.

THOMAS J. MORAN
Commissioner's Delegate

Nevada A

Decision of Appeals Referee
May 9, 1980

No. A-10-908

Violation of company rule:
Intoxicants, use of

Misconduct 485.45

A hotel powderroom attendant, who was found unconscious at work, was discharged for violating a known company rule concerning use of controlled drugs or liquor and/or sleeping on the job. A security officer, summoning an emergency rescue squad, reported that she had "overdosed." Claimant was in the process of getting a divorce and also had medical problems for which the medications Valium® and Perisctin® were prescribed. Because of tension on the job and domestic problems, she had taken more Valium® tablets than prescribed, falling unconscious. Upon revival she did not remember any conversations. She was taken home by another employee before the end of her shift. *Held*, eligibility affirmed since, in the final analysis, claimant's conduct did not reflect a wanton or willful disregard of employer's interest, was not a deliberate violation of employer's rules and did not show wrongful intent. Good-faith error in judgment or discretion is not indicative of misconduct.

Findings of Fact

The employer appealed from a determination allowing benefits on the grounds that claimant was discharged for reasons that did not constitute misconduct within the meaning of section 612.385 of the Nevada law. A hearing was held.

The claimant was employed as a powderroom attendant from 1976 to March 5, 1980. She was terminated for violating known company rules: "Possession, use or sale of controlled drugs; reporting to work under the influence of liquor, narcotics or drugs; sleeping on the job during working time; willful neglect, disregard or violation of any written or known hotel policy."

On claimant's last day of work she was found in a state of unconsciousness at approximately 5:00 to 5:30 a.m. The security officer summoned the emergency rescue squad reporting that the claimant had "overdosed." The rescue team arrived at the place of employment to administer aid in reviving the claimant. It took 15 minutes to do so.

The claimant and her husband were in the process of a divorce. She had certain medical problems for which she had been prescribed medications by her physician (see ex. # 3, dated April 22, 1980). The prescribed medications were Valium® and Perisctin® .

After the claimant finished her chores, and prior to that time, she had taken Valium® tablets. The claimant had taken more than the doctor had prescribed because of tension on the job and her domestic problems. As a result, the claimant was affected by the medication, which caused her to fall into a state of unconsciousness. Upon being revived she did not recall any conversations. She was taken from her place of employment to her home by another employee before the end of her shift.

Reasons for Decision

Section 612.385 of the Nevada law provides: "A person is ineligible for

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benefits for the week in which he has filed a claim for benefits, if he was discharged from his last or next-to-last employment for misconduct connected with his work, and remains ineligible until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of not more than 15 weeks thereafter as determined by the executive director in each case according to the seriousness of the misconduct."

In order to sustain a discharge on the grounds of misconduct the preponderance of evidence must show (a) a wanton or willful disregard of his employer's interest or (b) a deliberate violation of the employer's rules, or (c) a wrongful intent (MC 255.1-63, BSSUI).

The employer contends that the claimant, in taking an "overdose" of the prescribed medication, "showed a disregard of the employer's interest and was below the standard an employer has a reasonable right to expect."

The term misconduct in connection with the work is not a defined term in the Employment Security Laws of the State of Nevada. In a Nevada case (A-41-494) MC 300.2-81, BSSUI, in which the Nevada Board of Review affirmed the appeal referee's decision with approval of *Boynton Cab Company* v. *Neubeck*, 237 Wis. 249, 296 N.W. 636 [V4-8, 201, BSSUI], wherein the Supreme Court of Wisconsin defined such term. The Wisconsin Court stated as follows:

> It is generally held that the term "misconduct" (in connection with one's work) is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

The facts as presented show that the claimant did take more of the prescribed drug than what the doctor had recommended. This caused the claimant to fall into a state of unconsciousness. She was not "sleeping" in the ordinary definition of the word.

There was insufficient evidence to establish that the claimant was to report to the employer that she was taking prescribed drugs nor is there sufficient evidence to show that the claimant's actions were deliberate so as not to fulfill her employment obligations.

It may be argued that exceeding the recommended dosage of a prescribed drug is analogous to an individual being under the influence of alcohol while employed. The taking of alcohol is not in the same category as a prescribed drug, since it is not taken, generally, by prescription.

It may also be argued that, the claimant understood and could expect the consequences of her actions in taking more medication than prescribed. However, this is only a presumption, which standing alone, without a prior history of so doing and without direct or other competent evidence to show that the individual *deliberately* "overdosed," cannot be sustained.

There is no evidence to show that the claimant was under suspicion of using drugs other than those prescribed prior to the occurrence in question.

The claimant erred in taking more of the medication than what was prescribed. However, the preponderance of evidence in the opinion of this tribunal, does not reveal that type of conduct, willful, wanton, or deliberate, was committed by the claimant in order to sustain a discharge on grounds of misconduct. The Boynton case cited above, makes it clear that "good faith errors in judgment or discretion" are not to be deemed "misconduct" within the meaning of the Employment Security laws.

In Nevada Appeal Case A-41-494 (MC 300.2-81, BSSUI) this referee held in part that, "In holding that the facts do not show misconduct in connection with the work, the tribunal is in no way inferring that the employer did not have the right or was not provoked sufficiently to separate the claimant. This right or prerogative has always been that of management. Neither the referees nor the Appeal Board have ever interfered with that right."

Decision:

The determination under Section 612.335 is *affirmed*. The claimant is entitled to benefits from March 9, 1980, if otherwise eligible.

SYDNEY FARBER
Appeals Referee

Colorado B

Decision of Industrial Commission
September 8, 1980

DD 8245-80

Evidence

Procedure 190,380.1

Employer appealed on the ground that the referee failed to give proper weight to sworn statements and requested rehearing to present witnesses not present at the hearing. *Held*, eligibility affirmed and appeal denied. While submitted sworn statements are admissible at a hearing, since the individuals making them are not present and cannot be cross-examined, they are not the best evidence and were refuted by the claimant under oath. The only employer witness present offered only hearsay evidence, which is of little probative value. Thus, in weighing the evidence, first-hand sworn statements of claimant are given greater probative value than written statements offered by employer. Request for rehearing to present witnesses not present originally is properly rejected since adequate notice of the hearing had been given. Had request for continuance been made at the hearing, it would have been honored. Since this did not occur, the referee assumed that employer considered itself prepared with evidence deemed sufficient to support its position.

Findings of Fact and Reasoning

The industrial commission has reviewed the entire record and finds that the referee's determination was based on competent and substantial evidence and shall be affirmed.

On appeal, the employer argues that the referee failed to give due weight to sworn statements submitted at the time of hearing. Although admissible at a hearing, a sworn statement by an individual not present nor available for cross-examination is not the best evidence. In the case at hand, the claimant testified under oath that he was not intoxicated when terminated. The employer witness at the scheduled hearing offered only hearsay evidence, which is of little probative value. In weighing the evidence, the commission must rule that first-hand sworn statements of the claimant are of greater probative value than the written statements offered by the employer.

Further, on appeal the employer requests rehearing to present the testimony of the witnesses who were not present at the original hearing. This request is rejected because adequate notice was given to the employer of the scheduled hearing. Had the employer deemed it appropriate to have these individuals testify, a request for continuance at the time of hearing would have been proper. No request having been made, the referee must assume that the employer considered itself prepared with evidence deemed adequate to support its position.

In view of the evidence offered, it is hereby concluded that the referee's award of benefits was proper.

IT IS THEREFORE ORDERED: That the order of the referee issued June 27, 1980, be hereby *affirmed* in all respects.

INDUSTRIAL COMMISSION
OF COLORADO

HARVEY L. RUBINSTEIN
MIKE L. BACA
Commissioners

California B

Decision of Appeals Board No. P-B-414
August 28, 1980

Taking and perfecting proceedings for review: Notice

Procedure 5, 195, 430.15.

Claimant appealed a determination that she had been discharged for misconduct connected with her work (it was also determined that employer's reserve account was relieved of charges). An administrative law judge ruled in her favor, employer appealed. It was noted at the hearing that employer was represented by an agent, whose request for continuance was granted. Inadvertently, however, the agent was not notified of the second hearing; only the employer, who represented itself, was notified. Because the decision was adverse, employer appealed through the agent. *Held*, decision set aside and the matter remanded since employer did not receive a fair hearing inasmuch as its agent was not notified of the second hearing. The employer, a municipal agency which had elected reimbursable employer status, according did not have a reserve account. The ruling relieving such an account of charges, therefore, was determined to be in error and was also set aside.

Statement of Facts

The department issued a determination and a ruling which held that the claimant had been discharged for misconduct in connection with her work and the employer's reserve account relieved of charges. From this adverse determination the claimant appealed.

A hearing was held before an administrative law judge on September 20, 1979. The administrative law judge recited:

> . . . . The employer is represented by [Company A] in the person of [Mr. B] . . . .

Thereafter in the course of the hearing, the employer's representative asked for a continuance, which was granted.

A second hearing was scheduled for October 18, 1979, and the parties were so notified. Through inadvertence the office of appeals neglected to send the notice of hearing to Company A. The employer appeared at the hearing on the scheduled date and represented itself through one of its employees; Company A, not having been notified, did not appear. The administrative law judge issued a decision adverse to the employer and from that decision the employer appealed through its agent.

The employer, a political entity, has elected to finance its unemployment insurance coverage pursuant to sections 801 et seq. of the Unemployment Insurance Code, and is a reimbursable employer.

Reasons for Decision

Section 1334 of the Unemployment Insurance Code provides in part that the referee (administrative law judge) shall issue his decision after affording a "reasonable opportunity for a fair hearing."

Section 411 of the code provides that the appeals board "may promulgate rules or amend or rescind rules pertaining to hearing appeals and other matters falling within the jurisdiction."

Pertinent rules of the appeals board are contained in the following sections of Title 22 of the California Administrative Code, as follows:

READEX FICHE

> 5002. For the purpose of these rules . . . .
>
> (j) Unless the context otherwise requires, the term "authorized agent" is included in the words "appellant," "party," "petitioner," "proponent," or "respondent" . . . .
>
> 5004. Notices to Authorized Agents. Whenever the records of the appeals division indicate that a party is represented by an authorized agent, such agent shall be furnished a copy of all notices and decisions to which the party is entitled. Notices to an authorized agent for appeals and petitions filed by that agent shall constitute notice to the party. In all other cases parties shall be furnished a copy of such notices and decisions . . . .
>
> 5029. Notice of Hearing. Unless otherwise provided by the code, written notice of the time and place of hearing an appeal shall be mailed to each party at least ten (10) days before the date of the hearing; and written notice of the time and place of hearing any tax petition shall be mailed at least twenty (20) days before the date of hearing. The time of notice may be shortened with the consent of the parties. Any party may waive notice.

Section 5029 provides that notice of the time and place of hearing an appeal shall be mailed to each party. Under section 5002(j) the term "party" includes the term "authorized agent." Section 5004 provides that the notice shall be sent to an authorized agent whenever the records of the appeals division indicate that a party is so represented. "Party" would include either claimant or employer.

The reason the Los Angeles Office of Appeals did not send a notice of the second hearing to the employer's representative was because through inadvertence its records showed no representation. Under such circumstances we hold that the employer was not given "a reasonable opportunity for a fair hearing" in accordance with the Unemployment Insurance Code and the appeals board's rules because of the failure to notify the employer's agent of the second hearing. Therefore, the decision of the administrative law judge must be set aside.

The Los Angeles County Department of Public Social Services, having elected reimbursable employer status, does not have a reserve account. Accordingly, the department's issuance of a ruling was in error. The ruling is set aside.

Decision

The decision of the administrative law judge is *set aside*, as is the ruling issued by the department. The case is remanded to an administrative law judge for hearing and decision on the merits.

CALIFORNIA
UNEMPLOYMENT
INSURANCE APPEALS BOARD

DON BLEWETT
MARILYN H. GRACE
HERBERT RHODES
LORETTA A. WALKER
RAFAEL A. ARREOLA

Tennessee

[Affirmed, September 15, 1980, Supreme Court of Tennessee, unpublished.]

COURT OF APPEALS
MIDDLE SECTION

June 27, 1980

BRENDA J. DEPRIEST *v.* COMMISSIONER ROBERT J. BIBLE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY AND COMMISSIONER MOSE PLEASURE, JR., TENNESSEE DEPARTMENT OF HUMAN SERVICES

Conscientious objection

Voluntary leaving 90, 135.1, 160, 290

A secretary, employed 10 months by a State agency, applied for special leave to observe certain holy days. Denied, she took the days off anyway and was discharged. On appeal to referee, she was found to have voluntarily quit without good cause connected with her work. This was affirmed by the board of review and court below. She had used up all her accumulated annual and sick leave, as well as 3 days of special leave, prior to her request. At the time of hire she did not discuss the necessity of religious absences from work because of awareness of the agency's liberal annual, sick, and special leave policies. She felt that termination violated her rights under State and Federal constitutions. *Held*, disqualification affirmed, since effectively there is a "distinction between an employee forced to choose between religious principles and financial needs as a condition to receipt of unemployment benefits, and an employee who voluntarily quits when the conflict becomes unavoidable;" the latter situation present here.

Opinion

This is an appeal from the action of the Tennessee Department of Employment Security in denying unemployment compensation benefits to petitioner Brenda J. DePriest. Petitioner was employed by the Tennessee Department of Human Services as a secretary, in which capacity she served for approximately 10 months when she applied for leave to keep certain holy days of her religion, the Feast of Tabernacles and the Last Great Day, a total of 8 days. This request was denied by her employer and, thereafter, her employment was terminated in October 1978 after she left her job without permission and was absent during the above mentioned holy days. Thereafter, benefits were denied petitioner by the Tennessee Department of Employment Security on the ground that she voluntarily quit her latest employment. She appealed and a hearing was held before an appeals referee on December 20, 1978. On December 29, 1978, the appeals referee sustained the decision of the department in denying the petitioner unemployment benefits.

On January 5, 1978, Mrs. DePriest appealed to the board of review of the Department of Employment Security and a hearing was had on March 22, 1979, which resulted in a affirmance of the decision of the appeals referee.

On May 1, 1979, Mrs. DePriest filed her petition for certiorari in the Chancery Court, Part I, of Davidson County, and the case was heard on June 29, 1979, by Chancellor Ben H. Cantrell. Thereafter, on October 16, 1979, the Chancellor filed his memorandum opinion in which he sustained the action of the department in denying petitioner unemployment compensation benefits.

READEX FICHE

The chancellor's memorandum opinion is as follows:

At issue in this case is the right of a former state employee to unemployment compensation where she has been found to have voluntarily quit as a result of being absent from work to attend religious observances of her religion.

The facts are not seriously in dispute. Mrs. DePriest was an employee of the Department of Human Services and a member of the World Wide Church of God. In 1978 she had taken all of her annual leave days and requested 12 days of additional leave to observe the Feast of Tabernacles and the Last Great Day, which are holy days of her religion and which practitioners of that faith feel a moral compulsion to observe. Her request was denied by her department; when Mrs. DePriest did not report to work on these days she was terminated by the Commissioner.

The appeals referee found, essentially, these facts and concluded that Mrs. DePriest voluntarily left her job when work was available for her. The department's decision to disallow the claim was affirmed. The Board of Review adopted the findings and conclusions of the appeals tribunal and denied the claim.

Section 50-1324(a) denies a claim for benefits where an employee leaves his work "voluntarily, without good cause connected with his work . . . " Mrs. DePriest contends that under these circumstances the application of that law to her violates the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 3, and Article II, Section 15, of the Constitution of Tennessee. The Court disagrees with her contention and holds that the decision of the Board of Review should be affirmed.

The petitioner cites *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed. 2d 965, 83 S. Ct. 1790 (1963) [AA 90-49, BSSUI] as controlling on the federal constitutional question. That case held that an applicant could not be denied benefits for refusing to accept work which required her to work on Saturday, her Sabbath day. To do so would restrict the free exercise of her religion which is proscribed by the United States Constitution. Parenthetically, this Court observes that the same result might flow from the provisions of Article I, Section 3, and Article II, Section 15, of the Tennessee Constitution. Article II, Section 15 provides: "No person shall in time of peace be required to perform any service to the public on any day set aside by his religion as a day of rest." However, that is not the case here. The facts of this case do not present the question of Sabbath observance on a day set aside as a day of rest, but concern other holy days of her religion. Under ordinary circumstances these can be planned for and worked out within the liberal annual leave provisions of state government. Therefore, this case does not come within the rule of *Sherbert* v. *Verner*, and Article II, Section 15 of the Tennessee Constitution does not compel a different result.

The Supreme Court of California has recognized this distinction between an employee forced to choose between her religious principles and her financial needs as a condition to receipt of unemployment benefits, and an employee who voluntarily quits when the conflict becomes unavoidable. *Hilderbrand* v. *Unemployment Insurance Appeals Board*, 566 P. 2d 1297 (Cal. 1977). In doing so, the Court noted that where the employee accepted a job with full knowledge of the requirement of Saturday work and later refused to work on Saturday, the employee had voluntarily quit without good cause and was properly denied unemployment benefits. This is such a case.

The decision of the Board of Review should be affirmed and the petition dismissed at the cost of the petitioner. Mr. Harris will draw the order.

/s/ Ben H. Cantrell
Chancellor

October 15, 1979

The foregoing opinion was implemented by a decree dated October 19, 1979.

The Issues

The appellant states the issues as being:

(1) Whether or not the action of the State in denying petitioner unemployment compensation is violative of the first and fourteenth amendments of the U.S. Constitution.

(2) Whether or not the action of the State is in violation of article I, section 3, of the Tennessee Constitution, which provides that all men have a natural and indefeasible right to worship God according to the dictates of their conscience and that no authority can control or interfere with that right.

(3) Whether or not the action of the State violates article II, section 15 of the Constitution of Tennessee which provides that no person shall in time of peace be required to perform any service to the public on any day set apart by his religion as a day of rest.

(4) Whether or not the day of rest referred to in the constitution applies only to the Sabbath, or Sunday.

(5) Whether under T.C.A. section 50-1324 a person whose employment is terminated because she refuses to work on holy days of her religion may be deemed in the words of the statute to have "left his [her] most recent work voluntarily without good cause connected with his [her] work."

Conclusions

The record shows that Mrs. DePriest, after her request for leave to keep certain holy days of her religion, voluntarily stayed away from work, although apparently she did not thereby intend to resign from her job. However, she was terminated from her employment in October 1978 because of her absence from work.

It appears that Mrs. DePriest had been a member of the World Wide Church of God for 6 years and had kept these days of rest recognized by her religion during that time. It also appears that the Tennessee Department of Employment Security denied unemployment compensation benefits on the basis of Mrs. DePriest voluntarily leaving her most recent work without good cause connected with her work.

Counsel for appellant states in his brief and argument that Mrs. DePriest's position centers on the unconstitutionality of denying her social welfare benefits because she chose to be a member of a particular religious group and to follow the beliefs of that group in keeping certain days of rest, or holy days as she generally refers to them.

It is to be noted that, generally, when unemployment compensation benefit claimants appear without a lack of work separation notice from their employer, they are asked to make a statement regarding their separation from work at the time of the filing of the initial claim with the Tennessee Department of Employment Security. Such was the procedure in the instant case and, by her own admission, she stated at the time of filing her claim: "I requested 12 day special leave to observe certain holy days obligatory to my religion." She then went on to say: "My request for special leave was not granted . . . so I was absent without leave . . . . " [board of review ex. #2] However, in her testimony before the Department of Employment Security appeals referee she stated:

> In September I requested special leave to keep the Feast of Tabernacles and the Last Great Day, a total of eight days. A week later I was notified that this was denied. I went ahead and observed this thing . . . And when I got back, I had a letter of termination in the mail.

This letter, apparently, was written 10 days after the appellant had last appeared for work and as is observed by counsel for appellees, apparently Mrs. DePriest made no effort to actually inform her employer prior to leaving that she would be ignoring the decision not to grant her request for additional special leave and that she would absent herself from work by leaving the State for an extended period of time.

It is to be noted that Commissioner Bass informed her that her irregular attendance record had worked a hardship on staff members and was a determining factor in making his decision to terminate her employment, and he urged her in future employment to advise prospective employers of her religious commitment which would necessitate an unusually large amount of absenteeism.

The appellant's statements corroborate the fact that in no way did she initiate any understanding with her employer at the time she was hired concerning the requirements of her religion that she would be absent from work for an extended period of time to observe days of rest.

In the hearing before the appeals referee, the following occurred:

> Referee: Well, did you have any understanding with her or anybody else at the time you were initially employed, about taking off on holy days?
>
> Claimant [Petitioner]: No, sir. When I was first hired by Human Services, I was aware of the, you know, the annual days you get and the sick days, and that [I] could request special leave, and I just didn't think it was necessary. I thought I would have the days. I didn't know, you know, what was going to happen." [board of review, ex. #15]

As is pointed out by counsel for appellees in their brief and argument, appellant, prior to requesting her employer to grant additional special leave to attend these "days of rest," voluntarily chose to exercise her right as a State employee regarding annual and sick leave and used up at her own choice all of her annual and sick leave days accumulated during her tenure with the State.

The petitioner testified as follows:

> REFEREE: . . . Why didn't you use your annual leave for this purpose?
>
> CLAIMANT: I didn't have any annual leave because it had been used up because of sickness, and also my mother-in-law died in December and I had to take three days when I was working in the state office because . . .
>
> REFEREE: Well, for sickness – of course you can use sick leave . . .
>
> CLAIMANT: Yes. . . . So all the days were used up. So, I asked for special leave. [board of review, ex. #14, 15]

It is to be observed at this point that, actually, petitioner was not employed by the State in December. Her 10 months of service were from January to October 1978.

Apparently, the request of petitioner for special leave was not the first such request. Prior to requesting additional special leave for the "days of rest," appellant had already requested and had been granted 3 other special leave days as brought out by her supervisor in the testimony before the referee.

Ms. Schmidt stated:

> Mrs. DePriest requested the leave as already stated. However, as she also stated, she had used quite a bit of leave prior to that time. She had used all of her annual leave and all of her sick leave, and in addition to that, had gone into 3 plus days into special leave . . .

It should be noted that her use of sick leave was apparently not because of her own illness but was because of the illness of her daughter and/or her mother-in-law.

It appears that Civil Service Regulation 1120-2-2-.13 entitled "Tenure and Separations," in pertinent part, provides:

> . . . Any employee who is absent from duty for more than three consecutive business days without notice to his appointing authority or superior officer of the reason for such absence and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor or the appointing authority within two business days after the expiration of any authorized leave of absence, shall be considered as having resigned not in good standing, provided there were not existent circumstances over which he had no control.

It is to be noted that under T.C.A. section 50-1325(I), it is provided:

> . . . In any judicial proceeding under this section, the findings of the Board of Review as to the facts, if there be any evidence to support the same, shall be conclusive and the jurisdiction of said court shall be confined to questions of law . . . .

In *Bailey* v. *Tenn. Dept. Emp. Security*, 212 Tenn. 422 (429-430), 370 S.W. 2d 492 (1963), it was said:

> . . . The statute, T.C.A. Sec. 50-1325(I), makes the decision of the Board of Review as to the facts and inferences to be drawn from the facts the equivalent of a jury verdict . . . If, from the facts in the record, reasonable minds could differ as to the case of the unemployment, then the decision of the Board is final . . . .

Also see *Duke* v. *Scott*, 216 Tenn. 391 (397), 392 S.W. 2d 809 (1965), where it is said that the supreme court, as well as the chancellor, were bound by the finding where there was material evidence to support it. To like effect is the holding in *Griggs* v. *Sands*, 526 S.W. 2d 441 (443) (Tenn. 1975).

We agree with the contention of appellees that in the case at bar there is both warrant in the record and a reasonable basis in law to support the board of review's interpretation of the disqualification statute denying appellant's claim for benefits within the context of the specific circumstances of petitioner's separation from work.

In T.C.A. section 50-1324, concerning disqualification for benefits, it is provided an individual can be disqualified for benefits:

> A. If the commissioner finds that he has left his most recent work *voluntarily without good cause connected with his work* . . . [emphasis supplied]

In *Wallace* v. *Stewart*, 559 S.W. 2d 647 (649) (Tenn. 1977), the supreme court, speaking through Mr. Justice Fones, held that excessive absenteeism can be a basis for denial of unemployment benefits. The court stated:

> . . . No aspect of contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon.

On the commissioner's appeal in *Thach* v. *Scott*, 410 S.W. 2d 173 (176) (Tenn. 1966), the court was of the opinion that the chancellor was in error in reversing the action of the board of review and the court, speaking through Mr. Justice Harbison, stated:

> . . . Unemployment compensation is not necessarily health insurance. In several states "good cause" for quitting must be attributable to the employer or arise in connection with the work before the employee is said to be taken out of the category of having voluntarily quit. The Tennessee statute contains such a limitation, and the individual is disqualified if he leaves voluntarily without good cause connected with his work under the express terms of T.C.A. Section 50-134, subd. A . . .

In *Aladdin Industries, Inc.* v. *Scott*, 219 Tenn 71 (78), 407 S.W. 2d 161 (1966), in reversing a decree of the chancellor who affirmed the decision of the board of review to award benefits to an employee who claimed it was not a suitable offer of work and refused to accept a transfer, the court said:

> . . . To uphold the decision of the Board of Review would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain circumstances, make it almost impossible to carry on a business during certain hours . . .

Counsel for appellant relies heavily on the case of *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed 2d 965, 83 S.Ct. 1790 (1963) [AA90-49, BSSUI], which involves the denial by the State of South Carolina of unemployment compensation benefits to Mrs. Sherbert, who had been discharged from employment for refusing to work on Saturday because she was a member of the Seventh Day Adventist Church. South Carolina denied unemployment compensation benefits on the basis that this refusal to accept work, even under these circumstances, violated the requirement of the South Carolina statute, which is somewhat similar to the Tennessee statutes in that it provides that to be eligible for benefits a claimant must be able to work and available for work and, further, that claimant is ineligible for benefits where he has failed without good cause to accept available suitable work when offered.

While *Sherbert* v. *Verner* may plausibly be insisted upon as authority for petitioner's position in the case at bar, we think there are several distinguishing features which render the *Sherbert* case inapplicable as binding authority in the case at bar.

In *Sherbert*, the Court, speaking through Mr. Justice Brennan, expressly held:

> . . . Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment . . . Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest . . .

As is pointed out by counsel for appellees, Mrs. Sherbert's situation was different from that of petitioner DePriest in that the U.S. Supreme Court reversed in *Sherbert* not because the denial of unemployment benefits under the circumstances of her own creation surrounding her separation from her last employment, but because she was denied benefits in South Carolina because she would not accept new employment that would require her to be available for Saturday work, because she was a Seventh Day Adventist, and South Carolina did not find that Mrs. Sherbert was separated from her last job but voluntarily left without a work-connected cause. It did find that her own restriction upon her availability for Saturday work brought her within the provision of their law disallowing benefits to workers who fail to accept suitable work when offered.

In the case at bar, appellant's disqualification for benefits was based upon the circumstances of her own creation that surrounded her separation from work she had already accepted, and it did not force her to abandon one of the precepts of her religion as a precondition to eligibility.

It is to be noted that appellant's disqualification does not derive solely from the practice of her religion. Mrs. DePriest had already chosen to accept employment at a time when she was aware of the provisions for annual, sick, and special leave, and she did not seek any understanding with her employer at the time of her employment regarding her need for leave on special days of rest, and, furthermore, she chose to use up all of her accumulated annual and sick leave as well as 3 additional days of special leave before she decided unilaterally to leave her job behind in order to attend her days of rest in another State, and she left without any notification to her employer that she would be absent.

The Supreme Court of the United States has recently denied certiorari and let stand a California Supreme Court decision denying unemployment compensation benefits under an equivalent statute to that involved here.

In *Hildebrand* v. *Unemployment Ins. Appeals Bd.*, 566 P. 2d 1297 (1299), cert. denied 434 U.S. 1068 (1978), the board's denial of benefits was upheld on the ground that Mrs. Hildebrand left her last employment voluntarily without good cause and her former employer had replaced her because she failed to report for Saturday work due to her religious beliefs. Justice Richardson cited *Trans World Airlines* v. *Hardison*, 432 U.S. 63, 53

L.Ed 2d 113 (120), 96 S. Ct. 2264 (1977), and distinguished *Sherbert* as follows:

> . . . *Sherbert* is distinguishable from the present case. In *Sherbert* the high court examined the circumstances under which a prospective employee refused without good cause "to accept available suitable work." Although California imposes a similar "suitable work" requirement upon claimants (§1257), the legality of that statute is not before us. Instead, measuring the constitutionality of Section 1256, we must determine whether plaintiff, having initially accepted employment, thereafter left work "voluntarily without good cause." The public policy underlying section 1256 has been recognized both statutorily and judicially. By denying unemployment benefits to one who has voluntarily terminated employment without good cause, the state promotes a valid purpose in assuring that unemployment benefits are reserved "for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (§ 100; see *Zorrero* v. *Unemployment Ins. Appeals Bd.*, (1975) 47 Cal. App. 2d 434, 439, 120 Cal. Rptr. 255, 258)

For reasons indicated, the judgment of the chancellor is *affirmed*.
AFFIRMED.

THOS. A. SHRIVER
Presiding Judge
J. TODD *concurs*
S. J. MCCANLESS *concurs*

Oregon

COURT OF APPEALS

September 2, 1980

DEBORAH SOTHRAS *v.* EMPLOYMENT DIVISION AND DOUGLAS COMMUNITY HOSPITAL

Good cause

Voluntary leaving 210, 360, 425

A hospital lab technician, victim of rape and attempted murder at her home, quit her job because she could not remain in the general area of the attack while her assailant was still at large. *Held*, did so for good cause, such conclusion a value judgment that such action may arise for *personal* reasons, i.e., the action may *not* be objectively related to work; and, an extended unpaid leave of absence would not have been a reasonable alternative to leaving.

GILLETTE, P. J. (ROBERTS AND CAMPBELL, JUDGES)

The claimant, the victim of a rape and attempted murder, left her job because she felt that she could not remain in the area of the attack while her assailant was still at large. The underlying issue in this case is whether claimant's personal reason for leaving work can constitute "good cause" within the meaning of ORS 657.176(2)(c) and OAR 471-30-038(4). The employment appeals board, one member dissenting, held that it cannot. We reverse.

The claimant worked in Roseburg, Oreg., as a lab technician for Douglas Community Hospital. The employer described claimant as a "very good employee," and the claimant liked her job. However, on August 8, 1979, the claimant was attacked in her home and raped at gunpoint. After the rape, the rapist shot at and attempted to kill her. The referee's findings, adopted by the employment appeals board, recite that:

> "As a result of the attack, [the claimant] was in constant fear while she was in Roseburg. She developed the mental attitude that the rapist was "always there." [Claimant testified that she believed that she had seen the rapist sometime after the attack. At the time of the hearing below, her assailant had not been identified or apprehended.] [Claimant] took a leave of absence from work until September 18, 1979, at which time she decided that she could not remain in Roseburg. [Claimant] so notified the employer. [She] moved to Springfield on October 27, 1979. During the intervening time, she generally stayed with relatives. When she stayed at her house in Roseburg, she was unable to sleep in her bed. She instead slept on the couch with the lights on.

In an administrative decision, the employment division determined that claimant had voluntarily left work with good cause. The decision determined that:

> Your reasons for leaving were personal, but so compelling that you had no alternative but to leave work. Your fear of the alleged criminal made it impossible for you to remain alone in [the] area and continue working.

Based upon the findings of fact set out above, the referee agreed with the division's determination that claimant had good cause for leaving her job. The referee concluded that:

> [Claimant] acted as a reasonable and prudent person in leaving Roseburg, and as a result necessarily leaving her work in Roseburg. [Her] reason for leaving was of such gravity that she had no reasonable alternative but to leave work. Her traumatic experience with the resulting mental stress existing while she remained in Roseburg left her with no reasonable alternative but to leave work.

In a two-to-one decision, the employment appeals board reversed the referee. The board majority found that the employer would have extended the

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claimant's leave of absence and that the claimant "was sure that the passage of time would have alleviated the mental stress she was undergoing . . . ." Based upon these findings, two members of the board concluded that claimant has a reasonable alternative to leaving work. See OAR 471-30-038(4), *infra*. One of these two board members, relying on our decision in *Arias* v. *Employment Div.*, 26 Or App 841, 554 P2d 538 (1976), was also of the view that personal reasons unrelated to the job could not constitute "good cause" for leaving work. The other majority board member did not agree that the *Arias* case was still controlling or that "good cause" must be objectively related to the work.

The dissenting board member concluded that claimant had "good cause" for leaving work. The dissenter argued that the administrative rule, OAR 471-30-038(4), *infra*, "provides for a finding of 'good cause' for non-work related reasons," and that

> . . . . because of the mental stress brought on by the traumatic experience she suffered, the claimant had no reasonable alternative but to leave the Roseburg area, which meant leaving her work.

The claimant appeals. We reverse. We conclude that our decision in *Arias* is no longer controlling, that whether "good cause" may include personal reasons is a value judgment whose completion the legislature has entrusted to the division, and that the division's rule, as interpreted by the division, provides that "good cause" may result from personal reasons. We hold that, in this case, an extended unpaid leave of absence was not a reasonable alternative to claimant's departure from work.

We first consider the continuing effect of our decision in *Arias* v. *Employment Div., supra*. ORS 657.176(2)(c) provides that an individual shall be disqualified from the receipt of benefits for a period if the division's authorized representative finds that the "individual voluntarily left work without good cause . . . ." In *Arias* we construed the statutory phrase "good cause" . . . to refer only to a cause which is objectively related to employment, rather than arising solely from the employee's personal life . . . " 26 Or App at 846. However, we also recognized that in " . . . Oregon . . . the statute is silent as to what constituted good cause." 26 Or App at 844.

Since our decision in *Arias*, the supreme court has identified the source of responsibility for expanding upon statutory phrases such as "good cause." In *McPherson* v. *Employment Division*, 285 Or 541, 550, 591 P2d 1381 (1979), the court held that the phrase "good cause" " . . . calls for completing a value judgment that the legislature itself has only indicated. . . . ," and that it is the employment division which has the delegated responsibility to complete the value judgment.

> . . . [A]n agency decision is not "unlawful in substance," ORS 183.482(8).[1] . . . if the agency's elaboration of a standard like "good cause" is within the range of its responsibility for effectuating a broadly stated statutory policy. *Ibid*.

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[1] At the time of the decision in *McPherson*, ORS 183.482(8) provided:

"(8)(a) The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

"(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby; or

"(b) The statute, rule or order to be unconstitutional; or

"(c) The rule which the order enforces or upon which the order is based or dependent is invalid under the provisions of subsection (3) of ORS 183.400; or

McPherson indicated that interpreting "good cause" to include personal reasons for leaving work is not outside the range of the division's responsibility. While discussing the referee's opinion in *McPherson*, the court observed that:

> . . . passages in the referee's conclusions and reasons suggest an assumption that the grounds for leaving a job, to qualify as "good cause" under the statute, must be attributable to the employer. . . . Yet as we have noted, in this state that requirement was repealed soon after the enactment of the unemployment compensation law. The purpose of the statute is to provide a means of living for an unemployed worker, not to compensate her for a wrong done by the employer. . . . 285 Or at 556.

In view of this language from *McPherson*, we think it clear that our opinion in *Arias* in no longer controlling. Whether "good cause" may include personal reasons is a value judgment entrusted to the Division.

In *Oliver* v. *Employment Division*, 40 Or App 487, 595 P2d 1252 (1979), this court held that the division's completed value judgments must be expressed in formally adopted administrative rules. The division has adopted the following rule expanding on the stautory phrase "good cause:"

> *(4) Good cause for voluntarily leaving work under ORS 657.176(2)(c) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. The reason must be of such gravity that the individual has no reasonable alternative but to leave work.*
>
> (5) In applying the provisions of section (4) of this rule:
>
> (a) Leaving work with good cause includes, but is not limited to, leaving work after accepting a definite offer of other work which can reasonably be expected to continue and pays an amount equal to or in excess of the weekly benefit amount. Good cause shall also include, but is not limited to, leaving work that pays less than the weekly benefit amount to accept work offering pay greater than work left but less than the weekly benefit amount.
>
> (b) Leaving work without good cause includes, but is not limited to:
>
> (A) Leaving suitable work to seek other work;
>
> (B) Allowing union membership to lapse;
>
> (C) Refusing to join a bona fide labor organization when membership therein was a condition of employment;
>
> (D) Leaving to attend school, unless required by law. OAR 471-30-038(4)(5). (Emphasis supplied.)

We note that the rule does not exclude personal reasons. By its terms, the rule appears to include within the category of "good cause" *any* reason of sufficient gravity.

The division's authorized representative and the referee interpreted the rule as including personal reasons within the category of "good cause" for leaving work. Personal reasons, like job-related reasons, may constitute

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"(d) The order is not supported by substantial evidence in the whole record."

As amended, ORS 183.482(8) now provides:

"(8) (a) The court may affirm, reverse or remand the order. If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:

"(A) Set aside or modify the order;

or

"(B) Remand the case to the agency for further action under a correct interpretation of the provision of law.

"(b) The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

"(A) Outside the range of discretion delegated to the agency by law;

"(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or

"(C) Otherwise in violation of a constitutional or statutory provision.

"(c) The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record."

"good cause" if they are " . . . such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." Two of the board members (one of the majority members and the dissenting Board member)[2] followed and agreed with this interpretation. On this appeal, we also follow the division's interpretation of its own rule.[3]

We turn now to consider whether claimant had a "reasonable alternative" to leaving work. As we noted above, the board majority concluded that claimant had the reasonable alternative of an extended leave of absence. Claimant challenges this conclusion. We hold that a leave of absence was not a "reasonable alternative" open to the claimant.

The board majority based its conclusion that claimant had a "reasonable alternative" upon two findings of fact. The majority found that the employer would have extended the claimant's leave of absence, and that "claimant was sure that the passage of time would have alleviated the mental stress she was undergoing . . . ."

We first note, for what it may be worth, that it is doubtful that this last finding is supported by substantial evidence. The board majority indicated that its finding was based upon specific testimony which reads as follows:

> [By the referee]
>
> Q: Do you think your condition would have improved if you'd just toughed it out and stayed in Roseburg?
>
> [Claimant]
>
> A: Would have improved?
>
> Q: Yeah, the mental stress. Would it have as less — would it have lessened eventually, do you think?
>
> A: Oh, I'm sure that time takes — would have taken — care of some of it, but even when I go back there to visit my mom, I never go to Roseburg. I stay in Winston.

In any event, as claimant contends, we find that an extended leave of absence was not a "reasonable alternative" available to claimant. When claimant told her employer that she was going to leave Roseburg, and work, she had been on a leave of absence for more than a month. The record indicates, and the board majority found that the employer would have extended this leave of absence. However, the record also indicates that the claimant was not being paid while on leave.

The hearing on this case was held more than 4 months after the attack on claimant and almost 2 months after claimant had moved from Roseburg. At that time, claimant still could not stay in Roseburg when she visited relatives. In this situation, a protracted, unpaid leave of absence is not a "reasonable alternative" to leaving work and being unemployed; indeed it is not an *alternative* at all.

The board's finding that claimant is disqualified because she had a "reasonable alternative" to leaving work is *reversed*.

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[2] The third board member did not believe that the rule expressly excluded personal reasons from the category of "good cause." Rather, he felt that *Arias* was still controlling and that the rule did not " . . . specifically provide that strictly personal reasons are sufficient to constitute 'good cause' for leaving work."

[3] In its brief to this court, the division argued solely that the board's decision could be upheld because:

> " . . . [T]he fact that the petitioner quit work when there were alternatives including an extended leave of absence, supports the inference drawn by the [B]oard that there was available the reasonable alternative of not leaving the area."

As is demonstrated *post*, this rationale will not sustain the board's decision.

South Carolina

U.S. DISTRICT COURT
SOUTH CAROLINA DISTRICT
CHARLESTON DIVISION

November 18, 1980

MARY E. BROWN, et al. *v.* FRANCES E. PORCHER, et al.

Health or physical condition:
Pregnancy

Voluntary leaving 235.4
Able and available 235.4

Claimant and others similarly situated were denied benefits because they left work because of pregnancy. These terminations were determined to be voluntary quits without good cause because separations were for *personal* reasons and not attributable to employer. Claimants sought declaratory and injunctive relief inasmuch as such policy violated their Federal statutory and constitutional rights. They stressed that their position was limited to those women who were able to work and available for work and not those who could not work because of pregnancy. *Held*, denials reversed and injunctive relief granted. In the final analysis, "When a woman returns to the job market after having a child, she and her family can suffer real economic hardship if her employer does not rehire her and she cannot collect unemployment compensation." Thus, " . . . Congress prohibited *denial* of benefits to women because of pregnancy or termination." In this respect, therefore, the statute (26 U.S.C. section 3304 (a) (12)) imposed a "fundamental standard" upon the States, which, herein, was violated.

Introduction

This is a case of first impression. It is a class action challenge to the policies and practices of the South Carolina Employment Security Commission which deny employment compensation to women due to pregnancy. The Employment Security Commission regularly imposes the penalty of disqualification from employment compensation upon women who are otherwise eligible for aid if they left their most recent work due to pregnancy. The disqualification is imposed based upon a routine finding that women who left work because of pregnancy voluntarily quit their most recent work without good cause. Plaintiffs contend these policies abridge Federal statutory and constitutional rights. Accordingly, they seek declaratory and injunctive relief to halt implementation of the policies of which they complain. Equitable restitution is sought on behalf of those who have been injured by these policies in the past. It bears emphasizing that plaintiffs do not seek payment of unemployment compensation to women who cannot work because of pregnancy. Plaintiffs seek only to have compensation paid to women who are able to work and available for work.[1]

The Unemployment Compensation System

The unemployment compensation program is a joint Federal-State effort. Its purpose is to provide partial wage replacement for workers during periods of unemployment. The system was created during the Great Depression to ease the economic burden of unemployment "which so often falls with crushing force upon the unemployed worker and his family . . . " S.C. Code Ann. section 41-27-20 (1976). This cooperative system is governed by both Federal and State law. Under it, benefits are paid to eligible unemployed workers from a special trust fund. This fund is administered "separate and apart from all public monies or funds of the state." S.C. Code Ann. section 41-33-10 (1976). The fund is composed of monies paid by employers who are subject to the State's unemployment compensation laws. The system is similar in many respects to a simple insurance system. The amount of an employer's contribution is based upon the number of insured workers in his or her employ and the number of claims made against the employer's accounts. S.C. Code Ann. section 41-31-30 (1976). It, like other fringe benefit programs for employees, provides workers with partial protection against economic loss when they are out of work. Employer contributions to the unemployment trust fund can, therefore, be fairly characterized as payments made in lieu of wages. It is not a "welfare" system, but an entitlement system.

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[1] Plaintiffs' action focuses principally on those situations in which women have returned to the job market and are actively seeking work after having a child. In a few instances, the issues addressed in this action touch upon women who are seeking work while they are still pregnant.

Funds for the administration of the State's unemployment compensation program do not come from the compensation trust fund. Federal tax dollars pay these latter costs. The Federal funding mechanism is set out in both the Social Security Act and the Federal Unemployment Tax Act. 41 U.S.C. section 501, et seq., and 26 U.S.C. section 3301, et seq. These Federal laws allow the States to operate their unemployment compensation systems free from undue Federal interference. However, as part of this system of operating grants, the Federal government has placed a very limited number of explicit conditions on receipt of federal operating funds by the states. See *New York Tel. Co.* v. *New York Labor Department*, 440 U.S. 519 (1979). These standards apply to all states and "in the judgment of Congress are to be ranked as fundamental." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 594 (1937).[2]

In the instant case, plaintiffs seek to have the court enforce one of these fundamental standards. It is plaintiffs' position that the policies and practices of the South Carolina Employment Security Commission which deny unemployment compensation to otherwise eligible women because of pregnancy, violate the fundamental Federal standard set out in 26 U.S.C. section 3304 (a) (12). That provision states in relevant part that "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy."

South Carolina Law

South Carolina's unemployment compensation law creates a three-stage process for determining whether a claimant will receive payment. The first stage is a decision regarding whether the worker is "insured" pursuant to S.C. Code Ann. section 41-27-210. If the person is not "insured," benefits are denied. If the worker is "insured," a decision is next made as to whether he or she is "eligible" for benefits. Eligibility determinations turn on the claimant's ability to work, her availability for work, and whether the claimant is actually seeking work. S.C. Code Ann. section 41-35-110. An "insured" and "eligible" worker may nonetheless be denied compensation at stage three of the process. The penalty of "disqualification" can be imposed upon an otherwise eligible claimant pursuant to S.C. Code Ann. section 41-35-120. By far the two most common reasons for disqualification are those imposed because (1) an otherwise eligible worker "has left voluntarily without good cause his most recent work," or (2) because the worker was "discharged for misconduct connected with his most recent work . . . " S.C. Code Ann. section 41-35-120(1) and (2). Payment of benefits to those discharged for misconduct generally is delayed for a number of weeks. Those found to have "voluntarily quit" their last job are "indefinitely disqualified" from receipt of benefits.[3] The South Carolina Employment Security Commission uses these two provisions – principally the "voluntary quit" provision – to deny unemployment compensation to otherwise "insured" and "eligible" women who left their most recent work because of pregnancy. It has done so since at least the year 1972.

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[2] The leading case on the issue of fundamental standards is *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971) [PR 350-89, BSSUI]. In that case the U.S. Supreme Court ordered the State of California to amend its procedures to comply with the Federal requirement that its administrative system for payment of unemployment compensation "be reasonably calculated to insure full payment of benefits when due." 42 U.S.C. section 502(a)(1). In that action, the court allowed an individual claimant injured by California's practices to seek judicial redress under the Federal funding statutes.

Findings of Fact

Plaintiff Mary E. Brown and plaintiff Liberia Johnson are two women who were denied unemployment compensation because they left their most recent work due to pregnancy. They sue on behalf of themselves and a class of other women who are similarly situated. Both plaintiffs were indefinitely disqualified from receipt of unemployment compensation based on a finding by the South Carolina Employment Security Commission that they left their most recent work "voluntarily" and "without good cause" because they were pregnant.

Plaintiff Mary E. Brown is a member of the Church of Christ. It is a tenet of belief within the Church of Christ that it is wrong to artificially terminate a pregnancy prior to term. Mrs. Brown had worked full time as a dietary aide at Georgetown County Memorial Hospital. She learned she was pregnant in December 1977. She began to experience physical discomfort and sickness sometime thereafter. Her physician advised her not to work if work became too difficult for her. On April 11, 1978, Mrs. Brown informed her supervisor that she would be unable to work the following day. Hospital employees testified at Mrs. Brown's unemployment compensation hearing that Mrs. Brown's position at the hospital was not of the type which entitled her to a maternity leave. See Transcript of Hearing, Claimant Mary E. Brown, 7.[4] It is undisputed that her last of work was April 12, 1978.

Mrs. Brown gave birth to a son on September 14, 1978. On or about November 20, 1978, she sought to return to work but was informed by the supervisor of food services at the hospital that there were no openings in that department. On November 20, 1978, she applied for unemployment compensation benefits from the South Carolina Employment Security Commission. This application for aid was initially denied on December 15, 1978, by defendant Frances E. Porcher. Defendant Porcher gave as the sole reason for the denial that:

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[3] When disqualified "indefinitely," an insured worker can only requalify for unemployment compensation by returning to work and earning an amount equal to eight times his or her weekly benefit amount. S.C. Code Ann. section 41-35-120(1).

[4] While there is some dispute on the record about whether or not Mrs. Brown was granted a maternity leave from the hospital, that dispute is not relevant to the issues tried in this case.

> Claimant quit her job with [Georgetown County Memorial Hospital] on 4-12-78 due to pregnancy. This is a personal reason for quitting which is without good cause under the SCESC law and a disqualification is imposed.

The disqualification imposed was for an "indefinite" period.

Mrs. Brown appealed this initial determination. A hearing was held before defendant H. C. Sloan on January 5, 1979. Defendant Sloan rendered his decision on January 10, 1979. The decision affirmed the indefinite disqualification which had previously been imposed.[5]

Filing a timely appeal, Mrs. Brown sought reversal of her disqualification by the South Carolina Employment Security Commission. On February 23, 1979, defendants Comer [6], Baldwin, and Harper, acting in their official capacities as chairman, vice-chairman, and commissioner for the commission, affirmed the determination denying Mrs. Brown unemployment compensation.

Mrs. Liberia Johnson worked for Sam Solomon Co., Inc. in Charleston S.C., for more than 2 years. She was a sales clerk. After becoming pregnant, she began experiencing various physical problems and sickness. She had to stop working as a result. She also believed she had been granted a maternity leave.[7] Whether she had been or not, however, is not relevant to the issues in this case. Her last day of employment as Sam Solomon Co., Inc., was sometime in August, 1978.

Mrs. Johnson's child was born on February 25, 1979. When she returned to her old employer seeking work, she was advised that there was no work available for her.[8]

On April 20, 1979, Mrs. Johnson filed a claim for unemployment compensation benefits. On May 8, 1979, a claims adjudicator for the South Carolina Employment Security Commission disqualified Mrs. Johnson from receipt of benefits based upon a finding that Mrs. Johnson had quit her most recent work without good cause.

Mrs. Johnson appealed this initial determination to an appeals referee of the commission. A hearing was held on May 30, 1979, and a decision on that appeal was rendered on June 15, 1979. The appeals referee found that Mrs. Johnson's separation from work

> . . . occurred as a result of complications resulting from pregnancy. This is a personal reason not imposed upon her by the employer. Her quitting is therefore considered to have been for a personal reason, and personal reasons do not constitute good cause for quitting available employment within the purview of the law.

A timely appeal of the decision of the appeals referee was filed with the

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[5] In addition to disqualifying Mrs. Brown because she left her most recent work due to pregnancy, Defendant Sloan also found Mrs. Brown ineligible to receive aid. That subsequent finding of ineligibility is not at issue in this action. Eligibility determinations are made on a weekly basis. They depend upon whether a woman has looked for a job that week. The undisputed record in this case shows that during the month of January, 1979, Mrs. Brown made a number of in-person job hunting contacts and was subsequently employed as a maid. (Deposition of Mary E. Brown, p. 25, line 10, through p. 29, line 25.)

[6] By oral order of this court on July 14, 1980, Comer was stricken as a defendant and was replaced by Defendant Harper in his official capacity as chairman of the commission, Defendant Baldwin was replaced by the naming of a new defendant, Sandifer, in his official capacity as vice-chairman of the commission, and Defendant Harper was replaced by Defendant Baldwin in his official capacity as a commissioner.

[7] Transcript of Hearing, Liberia Johnson, 1, 2.

[8] *Id.* 2

South Carolina Employment Security Commission. Subsequently, defendants Comer, Harper, and Baldwin, acting in their official capacities as members of that commission, affirmed the decision indefinitely disqualifying Mrs. Johnson from receipt of unemployment compensation on the grounds that she had voluntarily quit her most recent work without good cause. Mrs. Johnson has never been found otherwise ineligible to receive unemployment compensation benefits by the South Carolina Employment Security Commission.

Leave to intervene as a plaintiff in this litigation was granted to Mrs. Johnson by order of this court dated February 13, 1980. That order indicated that Mrs. Johnson was fully qualified to serve a representative of the class sought to be certified.

The record shows that Mrs. Brown applied for unemployment compensation on November 20, 1978. She was unemployed until on or about January 24, 1979. The record also shows that Mrs. Johnson applied for unemployment compensation on April 20, 1979. The date of her reemployment, if any, is not shown on the record.

The named defendants in this action were or are all employees, agents, or members of the South Carolina Employment Security Commission. At all relevant times, each was acting in his or her official capacity with the South Carolina Employment Security Commission. All defendants are residents of the State of South Carolina and are subject to the jurisdiction of this court.

The policies at issue in this action are described in an official document published by the South Carolina Employment Security Commission. That document is entitled *Payment of Benefits to Pregnant and Post-Pregnant Claimants.* It reads in relevant part:

> 2. Any individual who voluntarily leaves her most recent work because of pregnancy is subject to the same disqualification provision of . . . the South Carolina Employment Security Law as any other individual who voluntarily leaves for a personal reason not attributable to the employment.
>
> 3. An individual who is separated by the employer because of pregnancy will not be subject to a disqualification period under . . . the Law.
>
> 4. A claimant who is separated from an employer because of a policy which provides for separation of a woman worker after a certain stage of pregnancy will not be subject to any disqualification under . . . the Law.
>
> 5. If an individual accepts a maternity leave of absence for a definite period, the Commission's policy governing leaves of absence will be followed if a claim is filed prior to the expiration thereof or after the claimant does not report back for duty.

(Unemployment Compensation Instruction MC-135 dated October 16, 1972. This document has not been superseded.)[9]

A document routinely distributed to claimants for unemployment compensation by employees of the South Carolina Employment Security Commission describes commission policy as follows:

> The South Carolina Employment Security Law provides in Section 41-35-120(1) that if the Commission finds that a claimant voluntarily left his most recent employment without good cause, such claimant shall be ineligible for benefits from the effective date of the claim and continuing until he has performed services in covered employment for one or more employers

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[9] A review of decisions introduced into evidence in this case reveals the Commission's policy regarding maternity leaves of absence. In brief, a claimant will be denied unemployment compensation if there is no job available for her when she returns to work after maternity leave if (1) her leave did not have a definite termination date (decisions #78-S-278 and #78-A-617), or (2) *if she attempts to return to work prior to the end of her maternity leave* (decision #78-A-98). If the employer's policy is not to provide workers with maternity leave, no benefits are paid despite the fact that an individual claimant is able to work and available for work (decision #78-A-194).

> and has earned wages for such services in an amount equal to not less than eight times the weekly benefit amount established for such individual.
>
> The South Carolina Supreme Court has interpreted the words "good cause" to mean a cause attributable to or connected with the claimant's employment.
>
> Personal reasons, therefore, do not constitute good cause for quitting. Example of such personal reasons are as follows:
>
> * * * *
>
> (d) Due to pregnancy.
>
> * * * *
>
> The individual who quits because he is dissatisfied with his job or for personal reasons as stated above will be disqualified for quitting without good cause.

(document UCB-236, rev. 11/77)

These policies are applied more or less uniformly in all pregnancy-related cases.[10] They were used to disqualify indefinitely both plaintiffs from receipt of unemployment compensation benefits. They are also applied on all levels of the decisionmaking process and in a wide variety of factual settings. The policies were effectuated, for example, in a case decided by the commission itself. In that case, the commission imposed an indefinite disqualification on a female security guard who left work to get away from an x-ray machine. After becoming pregnant, the woman was informed by her doctor that she could not continue working around x-rays. The employer had no other job available for the woman. Nonetheless, the commission found "her reason for quitting was not connected to or attributable to her employment" and an indefinite disqualification from receipt of unemployment compensation was imposed (decision #79-C-265).

In another case, a woman's maternity leave had been rescinded by her employer. The company only granted leaves to workers after they had been with the firm for more than 1 year. The woman had been with the company for 9 months. After having her child, the claimant was disqualified from receipt of unemployment benefits by an appeals referee for the commission for having voluntarily quit her most recent work without good cause (decision #78-A-2403).

An additional application of the commission's policies was made in case #78-A-4510. In that case, a legal secretary had become pregnant and was granted a maternity leave. The law firm for which she worked dissolved during her absence and there was no work available for her at the end of her leave. An appeals referee stated that:

> Had claimant not been on maternity leave at the time the law partnership was dissolved, she would have been laid off due to lack of work, and would therefore have been eligible for benefits. However, since she was on pregnancy leave at the time, she does not qualify for benefits. Her separation is considered to have been the result of personal factors.

An indefinite disqualification was imposed.

Another case involving the challenged policies contains the following findings of fact by an appeals referee for the commission:

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[10] Although the stated policy says that a woman who is fired because she was pregnant should receive benefits, some women found to have been discharged from their jobs because of pregnancy have been disqualified for aid under the "misconduct" provision of S.C. Code Ann. section 41-35-120(2). In the case of one Minnie S. . . . . . a claims adjudicator, on May 20, 1980, found that a claimant who left work 4 days before the birth of her child should be disqualified under the "misconduct" subsection because Mrs. S. . . . . 's "[a]bsenteeism, although for compelling reasons, shows a disregard for employer's interest." In decision #78-A-1732, a disqualification was imposed upon a woman who was discharged even though " . . . her reasons for being absent were of a compelling nature . . . ." In addition, decision #78-A-5528, involving a woman who was fired by her employer because she was hospitalized for 5 days for pregnancy-related testing, imposed disqualification on a finding that the woman had been discharged for work-connected cause.

> The employer had a policy for some of its departments requiring that employees immediately report pregnancy. This policy was necessitated by the existence of some evidence that materials used in those departments could be harmful to a human fetus.
>
> Claimant was aware of this evidence of the possibility of harm to her baby. Claimant indicated this concern to her employer and separation took place on mutual agreement between herself and the employer and involved medical personnel. Employer conceded that legitimate evidence does exist which would tend to reinforce claimant's concern.

In the face of these findings, the appeals referee imposed a disqualification. The disqualification was for a 5-week period. (The initial claims adjudication had imposed an indefinite disqualification as required by S.C. Code Ann. section 41-35-120(1)) (Decision #79-A-549.)

The commission's policy also was given effect in the case of a nurse's aide who refused a 90-day maternity leave; she believed it too short because she had encountered complications associated with her pregnancy. Three weeks after resigning, she suffered a miscarriage. When she returned to her prior employer, there was no work available for her. She was disqualified indefinitely from receipt of unemployment compensation (decision #78-A-3376).

The South Carolina Employment Security Commission receives approximately $25 million per year from the U.S. Department of Labor to pay for the cost of administering this State's unemployment compensation program. Accordingly, policies and practices must conform to the "fundamental standards" set out in relevant Federal laws.

Conclusions of Law

This court has personal jurisdiction over all of the defendants. It also has subject matter jurisdiction over the matters at issue in this action pursuant to 28 U.S.C. section 1337, 28 U.S.C. section 1331 and 28 U.S.C. section 1343(3) and (4), providing for jurisdiction in district court for claims arising out of violations of 42 U.S.C. section 1983. Jurisdiction also exists pursuant to the doctrine of pendent jurisdiction.

All of the prerequisites of a class action under rule 23(b)(2) of the Federal Rules of Civil Procedure have been met in this action.[11]

The class certified in this action is described as being composed of:

> Those workers who have been, are or will be insured under the South Carolina Employment Security law, who became or will become pregnant and thereafter whose employment terminated or will terminate for reasons arising out of their pregnancy, and who made or will make claims for unemployment compensation, who for any given week while their claim was, is or will be pending, were, are or will be able to work and available for work, and who were or would otherwise be disqualified from receipt of unemployment compensation benefits pursuant to S.C. Code Ann. section 41-35-120(1) or (2).[12]

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[11] This court has previously held that plaintiffs' claim for amounts withheld pursuant to the policies and practices challenged in this action is not barred by the 11th amendment to the U.S. Constitution. *Order*, February 13, 1980.

[12] To foreclose any possibility that women might be penalized inappropriately in the future, this class description includes imposition of a disqualification from unemployment benefits under either the "voluntary quit" provision or the "misconduct" provision of State law. A penalty based upon a finding that pregnancy-related absence from work constitutes "misconduct" would be as improper as one based on a finding that a woman who had to stop working because of the biological imperatives of pregnancy "voluntarily quits" her job.

As previously ordered by this court, Mrs. Johnson is fully qualified to serve as representative of the class of plaintiffs in this action.[13]

The first issue raised by the plaintiffs is whether the policies and practices of the South Carolina Employment Security Commission relating to pregnancy violate Federal law. Pursuant to 26 U.S.C. section 3304(a)(12), a State unemployment compensation system must be designed to ensure that:

> No person shall be denied compensation under such State Law solely on the basis of pregnancy or termination of pregnancy.

When Congress adopted 26 U.S.C. section 3304(a)(12), it imposed a sweeping ban on withholding unemployment compensation from women job seekers because they were pregnant when they left their most recent work. That a broad prohibition was intended can be readily seen if the statute is viewed in its proper historical context.

In evaluating historical context, it is important to recognize that the unemployment compensation system has undergone constant growth and development over the years.

The early history of federal involvement in unemployment compensation was detailed by the U.S. Supreme Court in *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971) [PR 350-89, BSSUI]. When originally adopted, the unemployment insurance program was designed

> . . . to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment . . ." Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for "security during the period following unemployment" was thought to be a means of assisting a worker find substantial equivalent employment. The Federal Relief Administrator testified that the Act "covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job . . . ."

Id. 131, 132 (footnotes omitted).

In addition, the system was intended to stabilize industry in times of economic decline. As the then Secretary of Labor told Congress:

> I think that the importance of providing purchasing power for these people, even though temporarily, is of very great significance in the beginning of a depression. I really believe that putting purchasing power in the form of unemployment insurance benefits in the hands of people at the moment when the depression begins and when the first groups begin to be laid off is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases, you will keep other industries from going downward, and immediately you spread work by that very device."

Id. at 132.

Since enactment of the first unemployment compensation program, there have been enormous changes in the American economy and work force. To keep pace with these changes, Congress has necessarily adjusted the system periodically. Only through constant legislative adjustment in a changing economy can the system function and fulfill congressional objectives. Examples of these adjustments can be seen, for instance, in the post-Korean War provision of unemployment compensation for exservicemen (5 U.S.C. section 8521, et seq.); in provision of benefits to government employees (5 U.S.C. section 8501, et seq.); in provision of insured status to employees of certain nonprofit organizations, State hospitals, and institutions of higher education (26 U.S.C. section 3309(a)(1)(A) and (B)); and, during the periods of high and prolonged unemployment of the late 1960's and early 1970's, in passage of the Federal-State Extended Unemployment Compensation Act of 1970 and its subsequent amendments (26 U.S.C. section 3304, note).

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[13] Defendants' attempt at trial to relitigate the issue of whether Mrs. Johnson's separation was pregnancy-related cannot be properly considered by this court. The issue was conclusively determined in the administrative proceedings which preceded this litigation. As a matter of State law, the findings of fact of the agency in an unemployment claim are conclusive. *Hyman* v. *South Carolina Employment Security Commission*, 234 S.C. 369, 108 S.E. 2d 554 (1959) [AA160.1-93, BSSUI]. Moreover, since defendants failed to dispute Mrs. Johnson's representativeness at an earlier hearing relating to her intervention in this action, they are estopped from raising the issue at this late hour.

While it further appears from the record that Mrs. Brown is also qualified to serve as representative plaintiff, that issue need not be decided here in light of the conclusion stated above.

As increasing numbers of ex-servicemen entered the job market, as government employment grew even larger but less secure, as nonprofit organizations proliferated, and as general unemployment grew, Congress took affirmative steps to make sure that otherwise employable individuals did not fall out of the mainstream of American economic life. It took these steps so that newly unemployed workers could avoid "turning to welfare or private charity" and thereby become members of a subterranean economy. *Id.* 132. It did so because it recognized that it "is essential that they be permitted to look for a job." *Id.*

In recent years, increasing numbers of women—particularly in the past decade—have entered the labor force. Recognition of this change in the composition of the work force has prompted congressional inquiry into the status of women workers and an examination of ways in which their participation in that arena can be encouraged.[14]

One obvious obstruction to women seeking equal partnership in economic life is that arising out of their unique biological role as childbearer. Indeed, even a cursory reading of the administrative decisions introduced into evidence in this case illustrates the premise that the process of bringing children into the world creates special problems for women who seek to have an economic role as well as a maternal one.

Congressional inquiry into the status of women in the work force was prompted in part by the U.S. Supreme Court. In *Turner* v. *Department of Employment Security and Board of Review of the Industrial Commission of Utah*, 423 U.S. 44 (1975) [MS 235.4-81, BSSUI], the Court addressed one of many problems confronting women workers. Until the *Turner* decision was rendered, many unemployment compensation administrators automatically presumed that pregnant women could not work. Based upon that presumption, pregnant women were routinely held to be ineligible to receive unemployment benefits. The U.S. Supreme Court abruptly halted this practice in *Turner*.

So far as it went, the *Turner* case was a positive step in removing barriers to the participation of women in the labor market. But the decision left important problems unresolved.

It is an inevitable part of pregnancy that there are physiological and biological changes in the expectant mother. It is also an inevitable part of pregnancy that the health and safety of the life growing within the woman can be affected by the external environment. Additionally, in our culture, it is an inevitable part of pregnancy that a woman must take time off from work to have a child. The biological imperatives of pregnancy, therefore, require women to seek a hiatus from participation in the work force. The time at which this hiatus is sought will, quite naturally, vary from individual to individual depending upon the circumstances. Some employers try to accommodate these needs and provide maternity leaves. Unfortunately, this accommodation is not universal. In cases where the employer makes no accommodation, another inevitability enters the picture. There is a termination of employment and attendant loss of income when the woman joins the ranks of the unemployed. When a woman returns to the job market after having a child, she and her family can suffer real economic hardship if her employer does not rehire her and she cannot collect unemployment compensation. The *Turner* decision did not settle the question of whether women faced with these circumstances could be denied unemployment compensation.

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[14] Congress has acted in other ways to encourage participation of workers in the national economy. The Civil Rights Act in 1964, for example, was designed to remove impediments to full participation in the labor force by minorities and women.

It was in this historical context and faced with this unanswered question that Congress passed 26 U.S.C. section 3304(a)(12). Relying upon its power to impose "fundamental standards" on all unemployment insurance programs, Congress prohibited *denial* of benefits to women because of pregnancy or its termination. The primary issue to be decided by this court is whether Congress, in its wisdom, answered the question that *Turner* did not address. Because this statute imposes a "fundamental standard," appropriate deference must be given by this court to insure that its full sweep and scope are achieved.[15]

By choosing to impose a "fundamental standard" upon the States, Congress obviously believed that it was addressing a problem of major proportions, significantly affecting large numbers of women in the work force. The device it used and the words it selected make this conclusion inescapable. It said, in imposing a "fundamental standard," that:

> No person shall be denied [unemployment] compensation . . . solely on the basis of pregnancy or termination of pregnancy.

In plain, unambiguous language, Congress imposed a sweeping ban on the use of pregnancy or its termination as an excuse of *denying* benefits to otherwise eligible women. These plain words must necessarily be construed to convey their ordinary meaning. *State of Maine, et al.* v. *Thiboutot, et vir., etc.*, 48 U.S.L.W. 4859; *Dobbs v. Train*, 409 F. Supp. 432 (D. Ga. 1975), *aff'd*, 559 F.2d 946; *Federal Ins. Co.* v. *Speight*, 220 F.Supp. 90 (E.D.S.C. 1963). If Congress intended a more limited prohibition or carved out exceptions, it would not have imposed a "fundamental standard" using such broad and sweeping language. It would have relied upon much more specific language and used appropriately restrictive expressions.[16] *In re Nissen's Estate*, 345 F.2d 230 (4th Cir. 1965). The language it did use, however, obviously left no room for exceptions. It does not permit denial of benefits, as in South Carolina, solely because (1) a woman, for pregnancy-related, medical reasons, voluntarily left work to have a child rather than wait for her employer to fire her, (2) a woman was refused a maternity leave or her leave had no fixed terminal date, or (3) a woman attempted to return to her job either before or after her maternity leave was scheduled to expire. The plain and unambiguous words of the enactment do not contemplate consideration of such irrelevant factors.[17]

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[15] Precedent exists for reading "fundamental standards" in the context of unemployment insurance broadly. In *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1971) [PR350 89, BSSUI], judicial inquiry was made into the meaning of the mandate that each unemployment system must be designed to insure full payment of benefits "when due." In that case, the U.S. Supreme Court specifically rejected a narrow interpretation of the "when due" standard because narrow construction would frustrate the congressional objective guaranteeing early replacement of lost wages.

[16] Appropriate words, for instance, to restrict the scope of the statute would have been "no person shall be found unable to work because of pregnancy or termination of pregnancy."

The foregoing conclusion is supported by an additional consideration. Congress would not have expended any effort in this area unless it thought it necessary to remedy a problem.[18] The statute being examined by this court is remedial in nature and must, therefore, be broadly construed to reach the problem it sought to end. *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967); *Wirtz* v. *Ti Ti Peat Humus Company*, 373 F.2d 209 (4th Cir. 1967), cert. denied, 389 U.S. 834.

The problem addressed by the statute under scrutiny was that the period of unemployment (and attendant wage loss) which necessarily accompanies pregnancy, can serve to force otherwise employable women out of the job market. Like all other unemployed workers, women who have stopped working to have a child can readily remain effective participants in the economy only if assistance is provided to encourage their return to work when they are physically able to do so. By providing partial wage replacement for pregnancy-related periods of actual unemployment,[19] Congress sought to facilitate the process of seeking reemployment. Absent some assistance, many women would be hampered in their effort to rejoin the work force. Absent, for example, some income to pay for child care expenses while looking for work, a woman cannot effectively compete in the employment process with others. If the statute is to fulfill the remedial purpose of encouraging a woman's search for a suitable job after having a child, it must be read to forbid the policies and practices complained of in this case. For it was those very policies which were used to deny plaintiffs the partial wage replacement that would have facilitated their job hunting efforts.

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[17] The statute at issue here is unambiguous on its face. Therefore, there is a real need to consider its legislative history. It is significant to note, however, that that history supports the conclusion stated above. In the final report of the House Ways and Means Committee, which considered the bill, its authors indicated that the statute was proposed to outlaw State statutes viewed to be "inequitable" because they "deny benefits without regard to the woman's ability to work, availability for work, or efforts to find work." These eligibility factors, the authors believed, "make discriminatory disqualifications because of pregnancy unnecessary." H.R. Rep. No. 97-755, 94th Cong., 1st sess., p. 50 (1975).

[18] Defendants have argued that 26 U.S.C. section 3304(a)(12) simply bans the States from presuming that pregnant women cannot work. This reading of the statute is inappropriate. It reduces the law to a simple codification of the *Turner* decision. Read so narrowly, the law has no independent force or effect. Congress should not, however, be presumed to have adopted useless or unnecessary legislation. *Jackson* v. *Kelly*, 557 F.2d 735 (10th Cir. 1977); *Knapcyyk* v. *Ribicoff*, 201 F.Supp. 283 (D. Ill. 1962).

[19] Congress has also acted to provide partial wage replacement for the period when a woman cannot work because of pregnancy. In an amendment to 42 U.S.C. section 2000(*e*), Congress has mandated that women not be excluded from receipt of disability insurance because they are unable to work due to pregnancy. This change in the Civil Rights Act assists women over an additional economic hurdle obstructing their participation in the marketplace. Like 26 U.S.C. section 3304(a)(12), the amendment forecloses the possibility that women would have to choose between a role as wage earner or a role as mother. Taken together, these two statutes implicitly preclude the possibility that harsh economic realities which would otherwise attend pregnancy will interfere with the right of working women freely to choose whether or not to have a child. *Cleveland Board of Education* v. *LeFluer*, 414 U.S. 632 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The fact that the language of 26 U.S.C. section 3304(a)(12) is coextensive with this fundamental constitutional right (reaching "pregnancy" and "termination of pregnancy") supports this conclusion.

In reaching this conclusion, this court is mindful of another historical and jurisprudential fact. In recent years, courts and Congress have expressly recognized that the issues involved in the process of bringing life into the world are of fundamental importance and require special consideration. For example, there has been recent recognition of the legitimacy of Congress' desire to promote and protect the role of women as mother as well as wage earner. *E.g.*, *Harris* v. *McCrea*, 48 U.S.L.W. 4948-49.

Defendants have urged this court to adopt a narrow view of the statute under examination and to sanction their practice of penalizing women because of pregnancy. They, of course, present various arguments in support of their views.[20] None of these arguments satisfactorily answers the question of why some women who have had a child should receive benefits while other women similarly situated should not.[21] The decision of when to stop working because of pregnancy necessarily will turn in each individual case on the facts and circumstances surrounding that particular pregnancy. Whether departure from work is promptly by environmental or health hazards on the job, complications arising out of pregnancy or the biological imperatives of child birth, the decision to stop working must be left to the woman and her physician in each case. That medical decision must be respected. Whether the woman receives unemployment compensation when she can return to work cannot and should not turn, as in South Carolina, on the whim or calculations of the employer.

In conclusion, an analysis of the historical context of unemployment compensation and the passage of 26 U.S.C. section 3304 (a)(12) supports plaintiffs' contention that the remedial legislation at issue in this case was intended to and plainly did address an issue inevitably touching a major part of the American work force. As part of the process of bringing women into full partnership in American economic life, Congress continues a trend which began with passage of the first unemployment compensation law and which is ongoing. It has and continues to adjust the law to match the present day realities of our economy.

Based on the foregoing, it is the finding of this court that the policies and practices of the South Carolina Employment Security Commission which disqualify otherwise eligible women from receipt of unemployment compensation because of pregnancy are in direct contravention of 26 U.S.C. section

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[20] During the course of this litigation, the U.S. Department of Labor has been silent regarding its position on the issues before the court. At trial, however, defendants produced a copy of a letter from the Labor Department dated July 9, 1980. The location of the original letter is unknown. The copy of the letter set forth the conclusion that the challenged policies of the South Carolina Employment Security Commission are consistent with the Labor Department's understanding of 26 U.S.C. section 3304(a)(12). While due deference is generally given to agency opinions by courts (*Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944)), in this case we find the evidence of the agency's view unpersuasive. It does not discuss the policies or issues involved in this litigation and cites no cases to support its conclusions. It also discusses concerns of the Labor Department clearly not at issue in this case; for example, the prospect that benefits would be paid to women who are not able to work should the plaintiffs prevail. As the foregoing discussion reveals, this latter concern is an unreal one. Finally, no evidence was introduced indicating what information had been given to the Labor Department by defendants which led the agency to reach the conclusion it expressed in its letter.

[21] Plaintiffs have argued that this disparate treatment of otherwise identically situated women violates the equal protection clause of the 14th amendment. Because this court finds for plaintiffs on statutory grounds and because, for equitable and practical reasons, retroactive relief is to be limited to the effective date of the statute (making independent relief on the constitutional grounds unavailable), this court finds it unnecessary to reach this and plaintiffs' other constitutional claims.

3304(a)(12). Accordingly, those policies and practices must be enjoined. Additionally, the class of plaintiffs are entitled to relief prospectively and, to the extent practicable, retrospectively. Because this court recognizes that (1) the cost of locating many class members disqualified prior to the effective date of 26 U.S.C. section 3304(a)(12) may be difficult, and (2) the amount of any individual claim is relatively small, granting retroactive relief to those disqualified prior to January 1, 1978, would be so cost ineffective as to be inequitable. Accordingly, retrospective relief is limited to those otherwise eligible applicants disqualified from receipt of unemployment compensation because of pregnancy since January 1, 1978. Further, it is the view of this court that the named plaintiffs in this action and other class members to be identified by name during the course of this litigation are specifically entitled to retrospective relief.

Order

In accordance with the preceding rationale, and to remedy the violations of law occasioned by the policies and practices of the South Carolina Employment Security Commission complained of in this action, it is hereby

ORDERED, ADJUDGED AND DECREED, that:

Prospective Relief

(1) The policies and practices of the South Carolina Employment Security Commission are declared to be in direct contravention of 26 U.S.C. section 3304(a)(12);[22]

(2) That the defendants and the South Carolina Employment Security Commission are permanently enjoined from formulation or implementation of any policy or engaging in any practice which disqualifies otherwise eligible women from receipt of unemployment compensation pursuant to S.C. Code Ann. section 41-35-120(1) or (2) because those women left their most recent work for pregnancy-related medical reasons.

(3) That the defendants and the South Carolina Employment Security Commission are ordered to make appropriate changes in their various regulations, manuals, notices, policy statements, and other documents, whether used internally or distributed to the public, in a manner not inconsistent with this opinion, and furnish a copy of all such revised instruments to counsel for plaintiffs within thirty (30) days of the date of this order;

(4) That the defendants and the South Carolina Employment Security Commission are ordered to furnish unto counsel for the plaintiffs copies of all decisions, including those of claims adjudicators, appeals referees or commissioners of the South Carolina Employment Security Commission, regarding women who were pregnant when they left their most recent work for a period of one (1) year following the date of this order;

(5) That the defendants and the South Carolina Employment Security Commission are ordered to post notices in each of their several offices throughout the State of South Carolina informing the public of this litigation and its outcome. The content of this notice is to be agreed upon by counsel for the respective parties within thirty (30) days of the date of this order;

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[22] As previously noted, because no independent relief is available and because plaintiffs have prevailed on the merits of their statutory claim, this court does not reach the constitutional issues pressed by plaintiffs.

(6) That the defendants and the South Carolina Employment Security Commission are ordered to amend the document now characterized as UCB-236 to make an affirmative statement that leaving one's most recent work due to pregnancy-related medical problems *is* good cause for voluntarily quitting an employment within the meaning of the South Carolina Employment Security law. Counsel for the respective parties shall agree upon the content of said affirmative statement within thirty (30) days of the date of this order.

Retrospective Relief

(1) The South Carolina Employment Security Commission shall pay unto the named plaintiffs and class members whose identities became known at trial an amount equal to the sum of the weekly benefit amount to which each was entitled times the number of weeks each was unemployed and eligible for benefits, minus a credit for any such amount already paid.

(2) The defendants and the South Carolina Employment Security Commission shall identify to counsel for plaintiffs within ninety (90) days of the date of this order all women who were pregnant when they left their most recent work, but whose applications for unemployment compensation were denied since January 1, 1978. Counsel for plaintiffs shall have access to the records of the Employment Security Commission regarding all those so identified.

(3) Within one hundred and twenty (120) days of the date of this order, counsel for the respective parties shall agree upon a listing of those persons identified pursuant to the preceding paragraph as to which ones shall be mailed written notice. Within thirty (30) days thereafter, those persons who are to receive notice shall be mailed, by first-class mail, notice of this litigation and its outcome and of the individual's presumptive right to receive retroactive unemployment compensation benefits. Names and addresses of persons receiving such notices shall be mailed by first-class mail to counsel for the plaintiffs. The content and form of said notice shall be agreed upon between counsel for the respective parties within thirty (30) days of the date of this order;

(4) The South Carolina Employment Security Commission shall pay to all those who respond to the aforedescribed notice within ninety (90) days of its mailing an amount equal to the sum of the weekly benefit amount to which each individual was entitled multiplied by the total by the total number of weeks each was unemployed and eligible for benefits, minus a credit for any such amounts already paid to any individual. Such payments shall be made within thirty (30) days after receipt of a notice of claim from an individual.

(5) Defendants shall give notice to counsel for plaintiffs of any claim or a class member it seeks to contest. Notice is to be served on the individual class member and counsel for plaintiffs within one hundred and twenty (120) days of preparation of the list of potential class members set forth in paragraph number (2) of the Retrospective Relief section of this order. In the event there are any such challenges, individual hearings before a special master, to be appointed by this court, will be convened within sixty (60) days of receipt by the court of a notice or letter from such class member indicating a desire to contest the decision of the defendants or the South Carolina Employment Security Commission. As the contesting party, defendants will bear the burden of proving that the claimant is entitled to a lesser amount of benefits than otherwise presumptively due.

Attorneys Fees

Plaintiffs, as prevailing parties, are entitled to recover their costs and reasonable attorneys fees. 42 U.S.C. section 1988. Plaintiffs are instructed to file their request for a specific amount, together with supporting affidavits and memoranda, within thirty (30) days from the date of this order. Defendants shall have thirty (30) days after service thereof within which to respond.

Plaintiffs are further entitled to additional attorneys' fees for work performed in implementing this order, including matters relating to retrospective relief, and may apply to this court for payment of such additional fees at an appropriate time in the future.

Time Limits

Any time limits established by this order can be extended or enlarged on application to this court and upon good cause shown or by consent of counsel for the respective parties.

AND IT IS SO ORDERED.

FALCON B. HAWKINS
United States District Judge

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Decision of Commission
November 26, 1980

No. 80-7614U

Working conditions:
Agreement, violation of

Voluntary leaving 515.15, 200.

The employer of a medical transcriber for an association of six doctors who had been hired on a 3-month probation period, had extended the period by 1 month in order to more fairly judge her work performance, which had been adversely affected by occupational circumstances not objectively attributable to her. She worked from 8:30 a.m. to 5 p.m., Monday through Friday. Occasionally the medical electric typewriter broke down and use of a manual typewriter slowed production. She did not have enough time to file charts and notes of patients. As a consequence, she had trouble locating this information when it was requested by nurses. She was told to file the notes and get help to do so. She was also told that filing charts was not part of her job. Employer was aware of her problems and that transcription was falling behind as a result. Her only predecessor had done the work in 36 hours each week. Employer, thus, extended the period of probation by 1 month. Several days later however, she resigned with 10 days notice, deeming the additional month of grace inadequate. Her resignation, instead, was accepted as of the next day. *Held,* claimant left work with good cause attributable to employer since he had substantially and unilaterally violated the employment agreement by extending it another month. The factor of "good cause" is relative to the *average* person acting reasonably and not a hypersensitive person. The factor of claimant's suitability for the work arose because of failure of employer's equipment and time-consuming office procedures.

Findings of Fact and Reasoning

The referee's findings of fact are supported by competent substantial evidence in the record and, accordingly, are adopted by the commission. Those findings are:

The claimant became employed by the employer, a professional association of six physician's [sic] as a medical transcriber on November 26, 1979. The claimant was to work from 8:30 am [sic] until 5 pm [sic], Monday through Friday, and she received a wage of $160.00 per week. During her employment the claimant encountered some difficulties in the work. On occasion the electrical typewriter would breakdown [sic] and the claimant would have to use a manual typewriter which would cause her to fall behind in her work. The claimant did not find as much time as she wanted in order to file charts and place notes concerning individual patients into their files. Because of a problem with filing charts, when the nurses would call for the charts, the claimant had difficulty in finding them. She was told by the administrator that if she could find time, she should file the notes and obtain the help from one of the staff members in doing so. She was also told that filing the charts was not part of her job. The physicians and the administrator knew that they were having problems in filing of charts and that the transcription work was falling behind. They had only had one other medical transcriber before the claimant. She had been able to perform her job within 36 hours. Because of the typewriter breakdowns and other problems, they decided to give the claimant additional probationary time to show her abilities. At the time of hire the claimant was told she would be placed on a three month probation. It ended on February 26, 1980. On February 28, 1980, the administrator told the claimant that they were extending her probation for one month. The employer wanted to be able to fairly judge the claimant's work performance. On March 3, 1980, during a staff meeting, the claimant advised them that she was going to resign. The claimant did not feel that an additional month would be of any help. She and the administrator discussed this further on that date. The claimant explained her dissatisfaction with the typewriter breakdowns and problems with the charts as well as the notes. On March 4, 1980 the claimant gave a written resignation. Her resignation was to be effective March 14, 1980. On March 6, 1980, the administrator told the claimant that she could leave the following day, March 7, instead of waiting the additional week to serve the notice. The employer had been able to find a replacement for the claimant to began [sic] Monday, March 10, 1980. The claimant's last day of work was March 7, 1980.

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The issue before the commission is whether the claimant voluntarily left employment without good cause attributable to the employer within the meaning of section 443.06(1), Florida statutes.

The referee held that the claimant voluntarily left her employment without good cause attributable to the employer and was disqualified for receipt of benefits. She reasoned that the claimant chose to leave her employment rather than remain employed for another month to prove her capabilities to her employer. The referee's decision is not in accord with the law.

Good cause, as that phrase is used in the unemployment compensation law, means such cause as would impel the average able-bodied worker to leave employment. The criteria for judging a worker's motive for leaving employment is the standard of reasonableness as applied to the average man or woman and not to the supersensitive. *Uniweld Products, Inc.* v *Florida Industrial Relations Commission,* 277 So.2d 827 (Fla. 4th DCA 1973) [VL 515.8-213, BSSUI].

The record establishes that the claimant was placed on a 90-day probationary period at the time she was initially hired. At the end of the probationary period, the claimant would become eligible for substantial fringe benefits. The probationary period was for a specific time period without any indication that the employer reserved the right to extend it.

The question of the claimant's suitability for the position arose not from anything she had done, but due to the failure of the employer's equipment and a time-consuming office procedure which required the claimant to help coworkers in locating and filing patient's charts. The equipment failures were not attributable to the claimant and the filing of charts was not one of the claimant's job duties. The employer-witness testified that the extension was deemed necessary to determine whether the claimant's production was attributable to the claimant or to problems which were specifically within the control of the employer. The employer substantially violated the employment agreement when it unilaterally decided to extend the claimant's probation for an additional month.

The decision of the appeals referee is revised. If otherwise eligible, the claimant is entitled to benefits.

It is so ordered.

UNEMPLOYMENT APPEALS
COMMISSION

R. CARSON DYAL, *Chairman*
DELOIS BASKIN, *Member*
CHARLIE HARRIS, *Member*

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